

PETER COLLIN
AGUSTÍN CASAGRANDE (EDS.)

Law and Diversity: European and Latin American Experiences from a Legal Historical Perspective

Vol. 1: Fundamental Questions



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Vol. 1: Fundamental Questions



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Preface

This anthology presents the results of two conferences held at the Max Planck Institute for European Legal History (now Max Planck Institute for Legal History and Legal Theory) on June 6–7 and June 24–25, 2019. The conferences and this book are part of the overall project “Law and Diversity. European and Latin American Experiences from a Legal Historical Perspective”. This volume deals with fundamental questions concerning the historical entanglements of law and diversity; further volumes on public law, private law, and criminal law will follow.

The editors would like to thank the editorial department of our MPI, especially Otto Danwerth and Tanja Köbler, for their excellent editorial support, Shilrey Fouzi, Jessica Jacobson, Philip Jolly, Gita Rajan, and Jonathan Sell for valuable support with language editing, and the student assistants Caroline Hoffmann and Richard Vigil for their help in organizing this publication.

Frankfurt am Main and Buenos Aires, August 2023

Peter Collin

Agustín Casagrande

Introduction

1 Problems of definition and understanding

1.1 Diversity as reality – concept – discourse – normative resource?

The term “diversity” has different levels of meanings in several respects. Firstly, this applies in terms of content: “The word means difference and aims at equality.”¹ So the term does not convey a message about equality or inequality, but about the relationship between the two. Secondly, the term has a twofold function: a descriptive and a normative one.² It refers to a certain reality, which it contours through its terminology, and calls for a certain way of dealing with it. At the same time, this reality is also normatively shaped. Diversity does not refer to all differences between people or social groups, but only to certain ones. What these are results from certain value decisions,³ which can be based, for example, on the desire to eliminate disadvantages or on the effort to counteract the disintegration of societies.

However, “diversity” is not only seen as a term or concept, i. e. a theoretical construct. Steven Vertovec defines it as “a wide-ranging corpus of normative discourses, institutional structures, policies and practices”.⁴ Thus, for legal historians, diversity would not only be observable and describable as a theory, but also as a practice. But to what extent is this concept really suitable for linking investigations of the past with it in a meaningful way? The question is relevant because diversity is, first of all, only used to describe a highly modern concept that as a legal problem – at least in this terminology – has only come into the field of vision of lawyers in recent decades. Both in some of the common diversity criteria (e. g. gender) and in the way diversity is dealt with (diversity management), it is difficult to draw a line to the past or to discover parallels there.

1 TOEPFER (2020) 1.

2 FOBLETS (2010) XIII; LEMBKE (2012) 50; DUVE (2013) 3 f.

3 LEMBKE (2012) 52.

4 VERTOVEC (2012) 288.

Nevertheless, this attempt seems worthwhile. For diversity in its normative dimension – not just as a mere description of difference and manifoldness – has a core function that can be observed throughout the ages: the marking of differences as important, as signalling a need for action and therefore as normatively relevant. However, this poses a problem. If in the past there was no specific diversity concept that named the relevant differences to be regulated by diversity management, then which differences should be addressed? For it is not sufficient to refer only to those differences that were explicitly addressed by the law of the time, but also to those about which that law was silent, but which were at the same time tacit premises of the legal order – or those differences that state law ignored, but which were made the subject of regulation by non-state actors.

If one asks about the decisive factors of social differentiation in the last 200 years, one has to consider two things. Firstly, one must ask by which guiding differences society as such is characterised and secondly, which different social groups become normatively relevant within such a differentiated society.

The first point refers to social theories with a broad scope. Contemporary social science thinking is strongly influenced by the assumption that modern society is a functionally differentiated society. In the course of the 19th and 20th centuries, this functional differentiation has increasingly replaced segmental and stratificational differentiation as the guiding social differentiation. However, this statement does not apply absolutely and in all its implications. Because functional differentiation does not completely eliminate stratificational and segmentary differentiation. This is pointed out above all from a non-European perspective, whereby a critique of the Western fixation on functional differentiation also resonates. Different perspectives are possible here. One can see the existence of non-functional forms of differentiation as an expression of insufficient functional differentiation⁵ and thus classifies these forms rather as a manifestation of still existing backwardness. Or one can accept, for example, segmentary differentiation, which is expressed in ethnic groups and religious communities, as a normal component of modernity, and assign this differentiation an “equal” place next to functional differentiation.⁶ It is also possible, however, to derive the insuffi-

5 On their different expressions: COLOMY (1990) 470 ff.

6 Also ZIEMANN (2017) 10; AMATO (2020) esp. 81.

ciency of functional differentiation, especially in non-Western countries, from the “internal” constructional weaknesses of functional differentiation, namely when one subsystem (e.g. politics) dominates another subsystem (e.g. law) and prevents it from developing autonomously.⁷

Even taking these controversies into account, however, it can be said that functional differentiation at least has become effective as a paradigm. This must be emphasised, especially from the perspective of legal history. For at the same time as the erosion of traditional forms of differentiation, an equality-based legal system emerged. This was no coincidence. The new legal system was a liberal legal system. Similarly, the emergence of functional differentiation was seen as the result of political upheavals for which the liberal movement of the time was largely responsible. Functional differentiation was considered a liberal project, as it were.⁸ Or to put it another way: the elimination of old differentiations – and that sense a de-differentiation – can be seen as a characteristic of the beginning of modernity.⁹ The individual living under the conditions of functional differentiation also corresponded to the liberal image of man. The individual was not – as in a corporative society – integrated into these functional systems as a “whole”, but is temporally and occasionally integrated, in certain audience roles or performance roles (*Publikums- und Leistungsrollen*).¹⁰ Simmel emphasized this early on by highlighting human individuality as a result of the “crossing of social circles”.¹¹ Here, people are not understood either as atomized individuals or as mere collective members,¹² but find themselves in a multifaceted “role pluralism”.¹³ On the one hand, they are free and equal¹⁴ because they are not fixed on belonging to a group from the outset. On the other hand, they are unequal, since every human being moves in completely different constellations of system affiliations.¹⁵

7 NEVES (2001) 258.

8 HOLMES (1985).

9 RÜSCHEMEYER (1991) 380.

10 STICHWEH (2000b) 88.

11 SIMMEL (1890) 103.

12 LICHTBLAU (2019) 13 ff.

13 TYRELL (1998) 136.

14 SCHIMANK (1998) 69.

15 SIMMEL (1890) 102 ff.

This does not deny the existence of inequality and of classes and strata. It is just that – unlike in a stratificational society – these no longer represent the guiding difference. However, this does not solve the problem of “social inequality”. Social inequality is expressed above all through unequal access to functional systems, e. g. in terms of sharing in the economy, political participation or the use of educational and health care services (“multi-dimensionality of inequality”¹⁶). Terminologically, as already mentioned, this is expressed as a problem of exclusion and inclusion in relation to certain subsystems.¹⁷ Whether and to what extent someone is hindered from participating in functional systems, however, does not only depend on their belonging to a particular class or stratum, but is also explained by a bundle of different factors, which include not only class affiliation but also ethnicity, age, sexual orientation and gender,¹⁸ and being situated in a certain location.¹⁹ From this perspective, then, social inequality does not primarily describe one difference, but rather the result of the combination of different differences with regard to sharing in the different functional systems. Social inequality becomes a problem because a society based on the guiding difference of functional differentiation in principle promises equal access to the functional systems and inequality – unlike in stratified societies – is therefore not taken for granted as a matter of course.²⁰ From this perspective, the actual guiding difference is that of inclusion and exclusion. This does not abandon the perspective of functional differentiation, but inclusion and the functioning of functional differentiation are placed in a relationship of mutual conditionality.²¹ Seen in this light, certain differences or combinations of differences can then be raised as a central theme from the point of view of social inequality and addressed as a special need for action in politics or law.

This brings us back to diversity. In a positive, supportive variant, diversity policy is not aimed at integration into society as such, but at enabling participation – i. e. inclusion – in individual functional systems, e. g. partic-

16 LUHMANN (1985) 120.

17 STICHWEH (2000b) 85 ff.

18 On the connection of gender difference with both stratificatory and segmental differentiation: TYRELL (2008) esp. 147 f.

19 STICHWEH (2000b) 97; SCHIMANK (1998) 62.

20 SCHIMANK (1998) 73.

21 NEVES (1992) 147 ff., esp. 186 Fn. 19.

ipation in the legal system through legal aid, the recognition of certain languages as court languages, or participation in the health system through affordable health insurance. Conversely, diversity policy in a repressive variant aims at exclusion in relation to certain sub-areas, e. g. in relation to the political system by withholding the right to vote, or in relation to the economic system by not granting legal capacity to act and thus the ability to conclude contracts. Diversity as discourse is thus a discourse about which group characteristics are relevant in relation to participation in social sub-systems.

1.2 Contingencies and national differences

However, diversity – in the sense of marking social differences as normatively relevant – is highly contingent even within the 200 years of modernity.²² The question of what difference makes a difference in legal terms is answered differently at different times. For example, different confessional affiliations can become less important for the legal system over time. The same also applies to gender affiliations – here, however, one has to deal with different effects of the legal system: gender affiliations can lose importance as a reason for discrimination, but gain importance as a reason for privileging. In addition, stratificational differences that persist in modernity can undergo a change of form. Traditional status differences linked to birth can be replaced by functional, occupational differences to which certain privileges and collective rights of participation are linked.²³ Trends towards the individualisation of self-images can give rise to new criteria of distinction that are propagated as authoritative. New collective identities can make their claims in parallel with the general recognition of the “formal individual”.²⁴ The history of the social movements that can be subsumed into the modern concept of diversity already shows variability in the view of the relevance of social differences. The origin can be seen in those movements that emerged in the 1960s, especially in the USA, and can be summarised under the keyword “affirmative action”. At first, the focus was on the black population, later expanded to other ethnic minorities; at the end of the 1960s,

22 BASTIAS SAAVEDRA (2018) 3.

23 KRAUS (2005).

24 ROBERTSON (1992) 184.

women were included, and people with disabilities in the 1970s.²⁵ From the 1980s onwards, the human resources departments of large companies discovered diversity and established “diversity management”. The 1990s saw an expansion, in two respects. First, diversity became global, as the concept of diversity was established in many other countries. Secondly, the concept of diversity was extended to include other features. Contemporary understandings of diversity-relevant differences include, for example: age, ethnicity, gender, race, physical abilities, sexual orientation, education, religious belief, work experience.²⁶

The broadness of the spectrum becomes even more visible when one takes into account the different environmental conditions for diversity at the national level. Considerable differences already result from whether we are dealing with states with or without imperial structures. The European nation-states of the 19th century created an identity for themselves by constructing a “national character” and by producing a nationalist ideology, thus distinguishing themselves from their European neighbours, but even more so from non-Christian and non-white societies.²⁷ However, when states were organised as empires, their multi-ethnic and multi-religious characteristics had to be taken into account. This did not speak against hegemonic forms of shaping difference, but coordination mechanisms and spaces of autonomy had to be made available that left sufficient room for the different identities. Another factor to be taken into account is the degree of democratisation, whereby – by comparison – advanced democratic structures did not necessarily have to be associated with growing recognition of diversity and self-organisation based on it, as the French example shows. Liberal policies could contribute to opening or cement the rule of certain elites. Economic development could produce open competitive orders or corporatist structures in which numerous special orders could emerge. Education policy could aim at equal general schooling for all or allow school structures that reflected economic inequality and /or religious difference. Social policy could distribute benefits in an egalitarian manner, create special groups of beneficiaries or stagger the allocation of benefits according to criteria of belonging to certain groups.

25 VERTOVEC (2012) 289.

26 VERTOVEC (2012) 289, 295.

27 OSTERHAMMEL (2004) 179 f.

Contrasts, but also commonalities, become particularly visible when not only states but also world regions are included in the comparison. The following reasons speak for a comparison of European and Latin American perspectives.

On the one hand, we are dealing with a common normative basis to a certain extent. Old European legal ideas also flowed into Latin America, especially through law of the Spanish colonial power. The norms and legal institutions, some of which date back to the European Middle Ages, were part of the legal order of the new nation states for a long time after independence. However, the adaptation to a special context linked to the indigenous peoples and slavery, incorporated from Europe, would modify the inherited tradition, forming a particular law of a casuistic and jurisprudential nature, which regulated each corporation, family and religious or political community differently, depending on the customs and needs of the local government.²⁸ Thus, from the beginning of colonisation, domestic practices of social control were established for those defined as minorities (Indians, women, mestizos, those detached from the domestic sphere, etc.) and judicial disputes over the bodies of slaves conceived as things, produced a *Derecho Indiano* that provided particular solutions depending on the different statuses of the “souls”. Different statuses determined the juridical practices that, when exercised on the actors, consolidated the paradigmatic situations instituted by law, considered in its radical function of a symbolic order that justified and consolidated the violence of the conquest.²⁹

But the ideas of the Enlightenment, modern constitutions and codifications aimed at national legal unity were equally part of the arsenal of European and Latin American states. It can be said that there was a new common normative basis: a law that did not regulate social life comprehensively, but only to an indispensable degree,³⁰ and in terms of content, the basic assumption of a law based on equality without privileges and differences in class. This universalism inherent in the declarations, however, must be observed through the particular appropriation in each political community. In the Latin American case, the idea of equality at the national level would clash

28 TAU ANZOÁTEGUI (2021).

29 GARRIGA (2019).

30 This fundamental difference between “Western” law, on the one hand, and Islamic and Talmudic law, on the other, is pointed out by GLENN (2014) 366.

with the complexities of the localisms inherited from the Indian legal order, with its traditional social pre-understanding based on an unequal structuring of society, particularly when considering gender, race and ethnicity.

Therefore, despite the consolidation of political principles that oriented towards equality, the legal system also included norms that directly or indirectly recognised or created inequality.

When it comes to the question of where the focus of regulation lay and to which socio-structural conditions regulators and users of regulation referred, significant contrasts between Europe and Latin America become apparent, especially in the persistence of personal bondage, in the treatment of ethnic groups, in the continued effect of pre-capitalist economic structures, in the role of immigration, etc.

Characteristic in Latin America is above all a continuity of pre-modern rationalities based on differentiated structures founded on a logic of inequality. Even when liberal European legal and political thought of the 19th century also penetrated the Latin American region, it had to pass through the filter of the pre-modern colonial legal and political tradition. In the history of legal discourse, this is clearly evident in the interpretations of constitutions and notions of equality, which were always read in the light of the traditional status-based value system.³¹ It should also be noted that, despite the declaration of liberal principles – such as equality – which were quickly incorporated into the political discourses of the new constitutional law, there continued to be a persistence of modes of social regulation, especially social control, within the framework of domestic political and economic structures. There was, for example, the long-term continuity of the domestic order of the “*estancias*” and “*ranchos*” as a model for the organisation of social life. This *dispositif* of social control was able to remain effective as long as its practices were made “invisible” against the backdrop of the paradigm of a modern unified national legal system. This was also possible because of a certain pragmatism that prevailed in the legal discourse of Latin American elites, which brought some normative practices into the light and left others in the dark. Thus, it was possible to criticise some of these practices that contradicted modern conceptions of law, while remaining silent about others whose continued existence was in the interests of the elites. As a

31 CLAVERO (2016).

result, the modern liberal project, far from recognising diversity in order to equalize social differentiation, in some areas actually led to the systematic repression of ancestral cultural expressions that did not belong to the Catholic tradition, or reduced the “universe” of equality to those householders, excluding women, children, and other household members, African Americans and indigenous people.

This constellation of problems was made even more complex by the immigration process, which added a new layer of normativity based on national differences. While the elites continued to cling to the concept of a unified national state organisation based on a formally egalitarian legal subjectivity – occluding race, gender and indigenous people – there was the formation of institutions that we would call private today, whose members embodied “national differences” within the “nation-state”. Here we see a difference between Europe and Latin America. The civil society organisations in Latin America, which initially emerged from immigrant collectives, maintained an integral system of mutual “socorros” (assistance) that was not – as in the German associations – organised around individual activities, but on the basis of a comprehensive solidarity among people with a common national past and a common religious background (Poles, Italians, Germans, etc.).

The result of this temporal interplay of religious, social and state-legal values is a very heterogeneous normative integration, which in turn shows similarities and differences at the spatial level, be it supranational, national, regional, local, or even from ranch to ranch. This phenomenon of multinormativity was registered and partly processed by the legal discourse of the 19th and 20th centuries, but at the same time neglected. This neglect of multinormativity and diversity is due to the self-limitations of 19th-century Latin American nationalisms. Indeed, as a result of the codification of law – both public and private – and also as a consequence of self-proclaimed “exceptionalism”, it was almost impossible to recognise local phenomena as overarching. In the face of this double national (historical-narrative) and state (legal-mythological) pressure, little is known about that normative knowledge from which the need to recognise normative diversity arises.

2 Aspects of the relationship between law and diversity

2.1 Consideration and non-consideration of social difference through law

When talking about law and diversity, attention is initially focused on those cases in which the law takes social differences as a reason for regulations. Here we are dealing with diversity, which is addressed by law as diversity. However, what about diversity that is ignored by law, in other words: what about those social differences that do not appear in legal texts?³² This can concern social differences of an ethnic, cultural, religious, but also economic nature – differences that are permanently reproduced in social practice, that have an inclusive or exclusionary effect, but that can also be associated with different notions of appropriateness, fairness and binding force.

Here, a relativisation is necessary in several respects: first, even a disregard of social difference in the sense of renouncing the setting of different legal consequences can be a reaction to social differences – namely in an egalitarian sense. The aim can then even be elimination of diversity as a social fact. Second, legislation linked to seemingly neutral criteria ultimately affects certain social groups in a particular way – the term for this is indirect discrimination.³³ We are thus dealing with the indirect legal constitution and regulation of diversity. And third, even if the law, e.g. codifications of civil law, does not know certain social differences, these can be taken into account at another level or in another dimension of law, for example in case law, in private standard setting or in other forms of legal practice. This can be described in different ways by legal theory. In the sense of Kelsen, one can assume different levels of legal concretisation at different levels of lawmaking³⁴ – that would be a hierarchical model in which diversity is treated differently in the different hierarchical levels of law. In the sense of legal pluralism, however, one can also speak of the coexistence of several legal systems. This also depends on how broadly one defines the concept of law

32 This is treated as a central question in BASTIAS SAAVEDRA (2018) 3.

33 In more recent times, however, the law has in turn reacted to this with countermeasures; see for Germany § 3 Abs. 2 Allgemeines Gleichbehandlungsgesetz (General Act on Equal Treatment), which equates indirect discrimination with direct discrimination.

34 See only PAULSON (2003) esp. 35 f.

and where one draws the line to non-legal norms.³⁵ The discussion about diversity and law is, therefore, also a discussion about the concept of law.

2.2 Dealing with diversity in terms of content and organisation: Possibilities and limits of typification

The previous remarks, however, do not yet address the question of how the law deals with diversity *in terms of content*. But it is difficult to draw up a catalogue of types that comprehensively covers the range of legal reactions to diversity. Basically, one can distinguish between the elimination of differences (which also includes assimilation) and the management of differences, which includes hegemonic control as well as the granting of autonomy rights.³⁶ However, this categorisation cannot be applied to all varieties of diversity. It should be noted that we are dealing with a complex variety of diversity relations, for which in turn different legal mechanisms come into play. This diversity can be described as follows:

- relations between the state and groups (autonomy rights, opportunities for participation in public decision-making processes ...)
- relations between the state and individuals (entitlements to public aid, access to education ...)
- legal status of groups under civil law (granting of association rights ...)
- rights of individuals under civil law (for example in labour law, family law or inheritance law)
- relations between groups and their members (membership rights)
- relations between groups (cooperation rules)

As is already clear from this list, we are dealing with a multitude of actor constellations. This already indicates that it is not only the state that acts as a manager of diversity. Rather, the legal handling of diversity can be observed at different organisational levels, involving state, semi-state and non-state actors. Here, one can indeed make generalisations and identify the following basic modes: state regulation, private-state co-regulation, regulated self-regulation, private / societal self-regulation. Certain forms of judicial regulation

35 On this, see above all TAMANAHA (2000). Critical of Legal Pluralism's fixation on "legal" normativities: DUVE (2017a) 91.

36 MCGARRY/O'LEARY (1993) 4 ff.; following them KYMLICKA/NORMAN (2000) 12 ff.

can also correspond to this (ordinary state courts, mixed state courts, semi-state courts, private courts). However, we must take into account the fact that not every type of diversity is equally open to all modes of regulation. There is a high potential for self-regulation where collectives capable of action have formed around diversity characteristics. Self-regulation, on the other hand, is more difficult, for example, in the case of disabled people or of those with diversity characteristics who are only able or willing to organise to a limited extent.

Attempts of this kind of typification could be continued. Here, perhaps, the benefit of resorting to other debates, in which extensive arsenals of categories have already been built up, may prove to be useful, for example, the debates on regulated self-regulation, non-state justice, legal pluralism and governance.

3 Manifestations of law and diversity in theory and legal practice

3.1 Preliminary remark: The dominant paradigm of equality-based law

Before turning to the manifestations of law and diversity dealt with in this volume, it is important to keep in mind the fact that the legal treatment of diversity took place against the backdrop of the prevailing paradigm of equality-based law. This will only be sketched here on the basis of three key concepts, whereby German references will be used for illustration (but which also play a central role in Latin America, e. g. in Argentina³⁷): person, codification, and system.

Until the 18th century, the term “person” (*persona*) was equated with the human being, but “*persona*” was rather a general notion of description, not a legal term with legal consequences, i. e. connected with concrete rights. Legal capacity was not addressed to the person as such, but rather was status-dependent in its manifestation, and therefore differed. This changed only at the beginning of the 19th century, when the general legal capacity came to be associated with being a human being.³⁸ This general legal capacity became the cornerstone of private law. Whereas in the past differ-

37 TAU ANZOÁTEGUI (1988).

38 HATTENHAUER (2011).

entiation was the norm, it has now become an exception requiring justification.³⁹ However, the – legal – guarantee of general legal capacity did not have as equalising an effect as it seemed at first glance. Firstly, this guarantee was powerless in the face of legal differentiation requirements, and secondly, the general private legal personality did not correspond to that of a general citizenship. As far as pre-March constitutions⁴⁰ even spoke of such a right, they associated this with a reservation of restrictions on the granting of *concrete* civil rights.⁴¹

Codifications, at least those of the 19th century, also had a levelling effect. This happened in several ways: their levelling effect unfolded not only personally⁴² and territorially but also in factual terms, by not recognising pluralistic solutions to legal problems and thus adopting a “monistic” approach.⁴³ Added to this, there is also the exclusion (or disregard) of legal areas, which – as Pio Caroni puts it – refer to “special, individual and sectoral relations”.⁴⁴ However, restrictions must be observed here as well. Firstly, this did not eliminate special law, but only shifted it to the margins – to special legislation. Secondly, the codifications of the 19th century embodied more of the law of a minority, because they primarily manifested the legal ideas of the (educated) bourgeoisie. Thirdly, it should be pointed out that the codifications (of private law) were actually quite “weak” law, since they contained a large number of dispositive provisions.⁴⁵

Differences were also levelled out by the formation of law in systems, which can be described as a determining trend in the development of jurisprudence in the first half of the 19th century – with practical consequences for later legislation. The idea of a system required starting from guiding principles, which had to be conceived consistently. Special law for particular groups – *ius singulare* – formed a foreign body in it. It did not result from legal rationality but from extra-legal political considerations – at least according to the predominant view in the Historical School of Law.⁴⁶ In this

39 DUVE (2003) 167, 175.

40 Constitutiones before the March Revolution of 1848.

41 SCHULZE (1982) 91 ff.

42 DUVE (2003) 175. From a sociological perspective, STICHWEH (2000a) 382 f.

43 KROPFENBERG (2009) 1918 f.

44 CARONI (2003) 30.

45 CARONI (2008) 76 f.

46 HAFERKAMP (2017) 232 f.

respect, the systematic legal approach that has shaped the modern understanding of law has also proved to be hostile to diversity. However, special law was not excluded from law; it was not illegitimate, but rather considered worthy of consideration – however, at the price of the purity of the principle. In addition, special law could also develop its own system rationalities, which in turn were based on guiding concepts and principles – as in the case of the law of merchants, i. e. commercial law.

3.2 On the content of this book

The question of how law is challenged by diversity is ubiquitous today. However, the legal-normative dimension of diversity can only be understood if the differences of national and regional contexts are taken into account. Therefore, the reader will find in this volume a dialogue between different traditions that invites us to think about “law and diversity” without starting from the traditional assumptions of “centre” and “periphery”, or “model” and “deviation”.

The choice of topics for this volume was based on fundamental questions concerning the relationship between law and diversity (further volumes will deal with how law and diversity manifest themselves in individual fields of law – in public law, private law and criminal law). The texts are main contributions and commentaries, each from different countries. The editors have linked the topics to specific questions, which are to guide the texts. On this basis, the main contributions deal with the respective topic comprehensively for a specific country. The commentaries address the questions raised by the main contributions and combine them with an outlining presentation of the topic in their respective national legal culture.

3.2.1 *Thinking on diversity and law*

The first thematic block focused on two interlinked theoretical-historical questions of thinking about law and diversity. On the one hand, the focus is on the statements of those sociological theories that dealt with social differentiation and could offer theoretical orientation to jurists, and on the other hand, on the traditions of pluralistic thinking within the legal field.

Alfons Bora's main contribution is devoted to the development of sociological models of social differentiation in relation to Germany. That is, he focuses on answering the question of how specific patterns of observation of social differences, economic inequality, cultural / religious / ethnic diversity as well as functional differentiations have emerged in sociological theorising, and examines which of these differences have been considered crucial for describing and analysing society from a sociological perspective. Bora presents a cartography of the various sociological theories of social differentiation, distinguishing between two approaches: "the dimension of the theoretical perspective or mode of approach, on the one hand, and the dimension of the particular model of social order taken by a scientific theory, on the other". Within these approaches, he distinguishes between normative and descriptive perspectives. In this way, he arrives at different ways of looking at things, which he describes with the terms "equality", "integration", "alterity" and "differentiation".

It is clear that such a grid of enquiry need not be limited to the history of German social scientific thought. Agustín Casagrande takes up the cartography laid out by Bora and unfolds it in an account of the development of the reception of theoretical models in the Argentine debate, from the first positivist theories (Comte) at the beginning of the 20th century to the conceptualisation of a local knowledge that seeks to distance itself from the logic of the model of the global North and postulates an epistemology of the South in the decolonial turn of recent decades. In this way, a dialogue emerges between two traditions that often cross the same conceptual register, but are populated by radically different contexts and ideas, and therefore vary in their socio-legal consideration of diversity.

The second group of contributions deals with pluralistic traditions of legal thought. The main contribution by Ralf Seinecke is commented on by Armando Guevara-Gil and Rodrigo Míguez Núñez. This thematic block examines the extent to which certain legal concepts were developed that could function as a counter-model to the concept of the state's monopoly on lawmaking, or at least modified this concept. In other words, the aim was to find out: to what extent were groups outside the state (occupational groups, ethnic groups, religious communities, etc.) seen as legitimate producers of law? To what extent were areas of judicial autonomy outside the state recognised? Was social diversity also reflected in a diversity of legislative and judicial powers?

Ralf Seinecke answers these questions in a contribution that seeks to sort out the difference and disambiguation of the plurivocal terms of legal pluralism and diversity. In it, he outlines a legal conceptual history for the German area that strives for an onomasiology of legal pluralism – *avant la lettre* – and a semasiology of the academic use of the term in jurisprudence. With a focus on private law and an analytical structure that summarises the characteristics of legal pluralism (law without a state, alternative legality, interlegality and *nomoi*), the author creates a genealogy that ranges from the Savigny-Thibaut debate to the positions of Ehrlich and Kelsen to the work of Radbruch after National Socialism and ends with the theories of the 1970s to the present: Benda-Beckmann and Teubner.

Armando Guevara Gil's comment takes up Seinecke's challenge and problematises the possibility of the emergence of pluralistic traditions of thought in Peruvian jurisprudence – pointing out that the limited resources of this discipline have tended to stand in the way of the emergence of elaborate independent theorising. Indirectly, however, long-term pluralist traditions of thought can be traced in the development of legislation and legal institutions, in a way that reverses the traditional liberal narrative of the standardisation of law. Codification here becomes a vehicle for the development of plural logics of social control. On the one hand, it is proposed to overcome the metaphors of spatiality in order to find diversity according to the temporal conditions in each of the different jurisdictions. An example is given by referring to the difference between religious regulations and civil-secular regulations; thus the age and residence requirements for priests as well as their rules regarding contact differed from those for laypeople. Institutionally, this is expressed in the changing diversity of procedures and law-producing organisations: mining, military, clergy, merchants, water management, justices of the peace, etc. The totality of legal traditions, logics and forms determines a universe of diversities that is theoretically captured by legal pluralism.

Míguez Núñez considers the Chilean experience in his comment. There, in a historical perspective, two processes are closely related to the theory of legal pluralism: on the one hand, the process of monopolising the production of law on the basis of state law and eliminating customary law as a source of law – a process that runs through the 19th and 20th centuries, especially in civil law – and, on the other hand, the experience of non-state actors seeking recognition of alternative forms of organisation within the

state. Thus, in a long journey that begins with the problem of customary law in the experience of *Derecho Indiano*, the long monist tradition is outlined, whose actors range from Andrés Bello to the strong Kelsen's reception in Chilean jurisprudence to the critique of monist law in the 1990s. At this point, numerous lines of connection to Seinecke's account also emerge, especially through the observation of the processes of reception of Kelsen's legal doctrine, which were not only "Viennese" but also strongly American. The call for the reactivation of other modes of non-state law formation subsequently also leads to the demand for greater consideration of the experiences of the indigenous population.

3.2.2 *Tendencies*

The theoretical preliminary explanations are followed by a thematic field in which the authors deal with different national experiences in coping with the tension between equality and inequality. The emergence of the modern nation-state was associated with a promise of equality, since this nation-state was built on the idea of a constitutive people, not on a multitude of ethnic, religious and other groups. At the same time, concepts of what this constitutive people should be like resulted in discrimination effects. The creation of a uniform citizenship had an equalising effect, but was associated with demarcations and exclusions. The attempt to legally protect the interests of certain groups could – because of the embedding of these attempts in a certain dominant legal logic – paradoxically also produce discrimination effects.

The first panel focused on the topic of "Diversity and Nation-Building". Here, the example of four countries – Brazil, Belgium, Spain / Catalonia and Argentina – is used to examine the extent to which the development of nations and nation states in the 19th and 20th centuries also brought with it problems in dealing with diversity. This problem arose above all where groups with different languages, ethnic origins, religious orientations or cultural identities existed within a national territory. How were these groups classified in a uniform model of citizenship? Which basic models of inclusive or exclusive problem solving become visible?

Pedro Ribeiro's main contribution, which served as a starting point for the discussion, deals with the case of Brazil. Ribeiro reconstructs the chequered history of those sociological ideas that emerged from the 1930s

onwards and later became accepted as common academic and popular ways of thinking about the specificities of Brazilian identity. Starting from a tripartite division of political-epistemic positions referring to socialism-communism, fascism-corporatism and liberalism-democracy, the author shows how certain imaginaries became horizons of expectation, which in turn served to write Brazil's history either as a deficit of homogeneity and of modernity, or as conditions of possibility for the unfolding of an alternative modernity.

This view of diversity in the construction of national identity is taken up by the other authors. The Belgian comment by Bruno Debaenst makes the substantial differences with Brazil visible, but also shows a commonality, namely a deficit finding as a starting point. In Belgium, it is the lack of a common language (Flemish in the north and French in the south, plus German-speaking areas and Brussels as a mixed-language city); in this context, linguistic diversity also reflects religious, political and socio-economic differences. Debaenst shows how, especially since the beginning of the 19th century, linguistic diversity and the attempt to arrange this diversity mark the Belgian path to national identity.

The question posed at the beginning of Ribeiro's contribution about what constitutes national specificity in the formation of national identity – and thus in the management of internal heterogeneity – is answered by Alfons Aragones for Spain and the national identity of Catalonia within Spain. For this, he chooses a codification-historical perspective that looks at the relationship between national civil law codification and regional law. It becomes apparent that regional identity did not have to come into conflict with legal unity. Only when regional legal traditions were not given sufficient consideration in the process of national codification did resistance form. However, this also shows that social differentiation played a role. The struggle of the regional Catalan elites was primarily directed at the preservation of regional law, which strengthened the socio-economic position of these elites. To legitimise this, narratives of Catalan identity were created in which the self-image of these elites was stylised into the ideal image of the "Catalonian".

Ezequiel Adamovsky questions Ribeiro's contribution from a double perspective. First, he notes that the paradigm of the "deficit", which serves as an explanation for the late entry into modernity, is not only a typical case of Brazilian cultural interpretation, but also generally part of a liberal concept

that assumes a lack of civil society in peripheral countries. In this sense, the process of colonial disciplining repeated by Latin American elites is also on a par with the social disciplining processes in Europe's "class society". On the other hand, the idea of "capacity" as a prerequisite for equality is highlighted, which served as one of the forms of constructing diversity to justify hierarchy and subjugation. This last aspect is taken as a starting point to analyse the case of Argentina, whose colonial division was based on a "caste system", which, however, was eliminated at the time of independence, not least because of the participation of the lower classes in the armed struggles. Nevertheless, one can observe how racial differentiations continued to shape social practice. At the same time, these racial differences are made invisible by constructing the Argentine national character around the model of the immigrant white Argentine. The process of nation-building is here presented as a tension between the politics of egalitarian postulates and the invisibilising strategies of the state, which manifest themselves in, for example, historical narratives and censorship practices.

The tension between equality and discrimination, which is visible in state action and social practice, is also dealt with in the following thematic focus. Under the title "Legal Lines of Development of Discrimination and Anti-Discrimination", two different national perspectives will be used to ask to what extent the negative or positive evaluation of unequal treatment has become the subject of legal discourse. At what point did it become clear that a certain type of unequal treatment required special legitimisation – or that it could not be legitimised? This also included dealing with different terminological manifestations: when did words like "discrimination" or similar terms appear as legally relevant concepts in legal literature, case law or the language of statute law? Which social groups were meant by them? What was the meaning of such terms?

Fernando Muñoz first looks at the history of the term "discrimination" and then describes the path to the formation of the legal term, in particular on the basis of the jurisdiction of the US Supreme Court. When describing the Chilean development, which he deals with in the following, two moments of constitutional development come to the fore. First of all, it is striking that the Pinochet regime's constitution of 1980 contained broad prohibitions of discrimination. Paradoxically, this solidified existing patterns of discrimination, because the constitutional norms were primarily directed against "arbitrary" and "irrational" discrimination, thus leaving traditional

unequal treatment, such as that of men and women, untouched. This way of thinking continued in the post-dictatorial phase. Although the new constitution banned discrimination against same-sex unions, this is undermined by case law that largely follows the old patterns of argumentation.

In her commentary on development in Czechoslovakia and subsequently the Czech Republic, Barbara Havelkova also focuses on the transformation from dictatorship to democratic republic. The socialist dictatorship in its egalitarian logic aimed at eliminating socio-economic inequality, but did not account for the socio-cultural dimension of inequality and, therefore, the discrimination mechanisms anchored in society. It remained with postulates at the constitutional level. This lag in development compared to Western European states and a neoliberal narrative that generated mistrust against state-imposed equality made the implementation of European anti-discrimination standards in the post-dictatorial period considerably more difficult.

In the next thematic complex, “Anthropological Approaches”, the main contribution by Orlando Villas Bôas Filho deals with the problem of the juridification and judicialisation of social conflicts and the normative dimensions of diversity resulting from this process. In his study, which draws particularly on French theory but is applied to the case of Brazilian indigenous peoples, the author shows the effects of the juridification of conflicts around land claims and the recognition of different ways of life. On the one hand, the “legal common sense” based on state law and a language of invisibilisation of otherness is examined and countered with a sociological and anthropological critique. On the other hand, the analysis of practical cases shows how legal demands are neutralised by the imposition of legal categories that deny forms of otherness. The legal recognition of diversity is thus undermined by embedding it in legal categories.

In his commentary on Villas Bôas Filho, Eduardo Zimmermann proceeds in two steps. He starts by showing how progressive thinking and racist concepts entered into an alliance in Argentina at the beginning of the 19th century: backwardness could only be overcome through the dominance of the (Northern European) white race; the postulate of equality proved illusory under the rule of a socio-biological approach. This is followed by comments on Villas Bôas Filho, which draw particular attention to the differences between legal categories and empirical findings. Is it not in the logic of legal categories that they must detach themselves in their abstractness from

the concreteness of real diversity? Are indigenous groups actually better able to assert their interests when they operate within the logic of their traditional conflict resolution? Do the mechanisms of modern state justice not also offer adequate solutions? The ambivalence of state law in dealing with the legal problems resulting from diversity thus becomes clear in both contributions.

Nancy Yáñez also addresses the problem of juridification and, without denying the difficulties of enforcing rights, does not subscribe to the pessimistic view that juridification serves to enforce the legal common sense of the state. Her commentary does not focus exclusively on Chile, but covers the entire Latin American spectrum. She shows how indigenous rights have gained recognition in recent decades. The indicator is not only the recognition of these rights in the constitutions of individual states, but also the jurisdiction of the Inter-American Court of Human Rights, which, by setting a minimum standard, creates the conditions for a meaningful coordination of different legal and anthropological conceptions. This also challenges state juridical monism and enables a dialogue in which communities with their different conceptions of rights and legal practices have their say.

3.2.3 Legal frameworks

While the previous thematic blocks focused on how normative knowledge and socio-historical framework conditions combined in the acceptance, rejection or ignorance of diversity and were reflected in the mentality of the actors, the following thematic block looks at the juridical ciphers of thinking about diversity. It deals with constitutional structural patterns that fundamentally mark the relationship between equality and difference, i. e. “legal personality”, which is the starting point for both egalitarian thinking and the freedom that allows for difference, and “autonomy”, which denotes individual and collective spaces of freedom in which diversity can unfold. Finally, the “languages of law” are dealt with. Here it becomes visible to what extent linguistic diversity is taken into account and practiced by law-makers and the application of law.

Initially, the discussion focuses on the topic of “the constitutional embedding of differences” and, thus, on how diversity manifests itself at the constitutional level. Some general questions guide the debate: when were the problems of certain social, ethnic or religious groups addressed in constitu-

tions? In what way were and are they taken into account – as a prohibition of unequal treatment, in the form of granting special rights, as a requirement of assimilation? What tendencies can be observed at the constitutional level?

The main contribution by Manuel Bastias Saavedra introduces the topic of “Constitutional Law and Diversity” using the example of Chile. The author first makes clear the difference to the thought patterns of the colonial Ancien Régime. There, social reality and law are seen as identical. The social differentiation that exists in reality is willed by God and finds its appropriate expression in law. The modern constitutions since the end of the 18th century, on the other hand, proceeded from the principle of equality. Legal inequality could no longer result from a social order, but could only be created by law. The 19th-century constitutions ignored the old status distinctions based on ethnic criteria and introduced new ones – initially through the distinction between the categories of nationality – which covered all Chileans – and (active) citizenship, which was determined primarily by gender, age and economic and/or intellectual capacity. It was only in the course of the 20th century that much of this regimentation was removed. The constitutional recognition of religious diversity was initially only recognised in the admission of private practice of non-Catholic denominations; it was only from the second half of the 19th century that the equality of denominations was gradually extended, even though many constitutional norms continued to be shaped by Catholic values. Ethnic diversity, on the other hand, was not the subject of constitutional regulation until very recently, although it must be noted here that quite a few territories of indigenous groups were not within the reach of state power and, after their incorporation, were subject to a special legal regime and not to the constitutional “normal” order, so that part of the indigenous population could not invoke constitutional guarantees. Chilean constitutional law thus made traditional social differences invisible on the one hand, but on the other hand partially perpetuated them by indirectly preserving them in new constitutional categories.

The commentary by Agnieszka Bień-Kacała and Anna Tarnowska on Polish development draws attention to four constitutions: two liberal ones, from 1921 and 1997, respectively, and two authoritarian ones, from 1935 and 1952. The 1921 and 1935 constitutions were written for a multi-ethnic, multi-religious and multi-lingual society, the 1952 and 1997 constitutions for a largely homogeneous people. In principle, all these constitutions assumed

a category of citizenship that applied to all inhabitants, which – unlike in early Chilean development – was not limited by criteria of economic and intellectual ability (though this was standard in the 20th century anyway). However, this was partially undermined in the authoritarian constitutions: by meritocratic and class criteria for the passive suffrage in the 1935 constitution, and indirectly, in the designation of “workers and peasants” as bearers of people’s democracy, in the 1952 constitution. In religious terms, the pre-war constitutions reveal a privileging of the Catholic Church despite postulated religious tolerance (which can also be observed subliminally in constitutional practice after 1997), while the communist constitution of 1952 was largely silent on the position of the Church (the struggle against the Church did not take place here at the constitutional level, but rather in administrative practice). The privileging of large landholdings in the pre-war constitutions as well as in the 1952 constitution (for agricultural collectives) can be seen as a special form of constitutional differentiation; this special constitutional treatment of ownership of land found a certain continuation in the privileging of the peasant family farm in the 1997 constitution.

The question of the legal level (below the constitution) at which diversity is processed is discussed in the topic area “System and codification – externalisation or integration of special law”. The starting point for the considerations are the major codifications of the 19th and 20th centuries with their systematising, and thus also equalising, regulatory concept. The discussion followed a series of guiding questions aimed at organising the debate: what effects did the enactment of codifications and the development of systematic thinking have on the “special laws” of certain social groups? Did codifications and systems tend to have a diversity-levelling effect due to their universalistic claim? Or could special legal spaces be integrated into them?

In his main contribution on Italian development, Massimo Meccarelli outlines the general characteristics of modern codified law: legality, sovereignty and formal equality. This is associated with an abstractness of law that is divorced from social reality and leaves little room for consideration of the “particular”. The question is how the law maintains its principled monistic claim, and, at the same time, enables itself to process special problem situations through special legislation. To this end, Meccarelli identifies three strategies, which he substantiates with examples: integration through protective special law in the case of social and labour law, exclusion through special regimes that negate the guarantees of the rule of law in the struggle

against political crime, and an anti-assimilative approach in the case of colonial law.

The first commentary on Meccarelli comes from Carsten Fischer and Hans-Peter Haferkamp, who deal with the German development, specifically with the attitude of German jurisprudence to the relationship between the system and *ius singularis*. *Iura singularia* were rights assigned to certain groups of persons (e.g. minors, the elderly, soldiers, women, merchants). Traditionally, they were strictly divorced from general civil or natural law – which embodied “strict” law – and assigned less to genuine law than to “utilitas”. This contrast could then be intensified when law was conceived as a system that was controlled by superordinate principles, that embody the claim to equality and universality. Starting from the insight that special law could not simply be ignored, even by a jurisprudence committed to the systemic concept, in the 19th century there was a discussion about the possibilities and the way of integrating this special law into jurisprudential systems and into codifications. Taking up Meccarelli, the authors state that Italian jurisprudence dealt with this problem rather pragmatically, while German scholarship was more committed to a purist perspective. However, this does not yet take into account the issue of how jurisprudence and scholarship solved the problem of special law and general law in application – this remains a blind spot.

Jean-Louis Halpérin analyses the French codification process, which was not only an ideal type of monistic legislation, but also an exemplary model for the development of codification in other countries. His contribution, which begins with the Revolution of 1789, shows the contradictions inherent in the model, especially the exclusion of women from the postulated principle of equality in family law. On the other hand, he follows Meccarelli’s approach by highlighting the peculiarities of the French system with regard to labour law and the special orders of criminal law, as well as the anti-assimilationist thrust of colonial law manifested in the distinction between French subjects and French citizens; the discriminatory law of the Vichy regime can be classified under the same heading.

Thiago Reis, who discusses the Brazilian case, first emphasises the importance of problematising the methodological criteria, especially with regard to the understanding of the concepts of “equality” and “inequality” and the temporal and factual contextuality of the perspectives on “diversity”. In this context, the Brazilian case is interesting because the Brazilian Civil Code was

enacted at a time (1916) when the liberal-monist concept of the 19th century had already lost much of its reputation and there was a greater openness to socio-political intervention in general law. However, Reis also draws attention to another aspect of the relationship between codification and special law that is typical for Brazil (although not unique to Brazil). With the emergence of corporatist structures and the concomitant weakening of parliament, the relations between general law and special law also shift. This relationship is, therefore, not only determined by legal-theoretical preferences and the temporary dominance of certain regulatory needs, but also simply by power relations.

A key term in the debate on law and diversity is “autonomy”. Distinguished from the term “private autonomy”, which describes individual freedom in the field of private law, it is used to describe the right of non-state groups or sub-state entities to set their own law and, if necessary, to enforce it by their own judicial or administrative means. However, the concept of autonomy has taken different legal forms in different national legal cultures. In this block, the contributions focus on the specific national contours of the concept of autonomy and the role it played in the legal discourse of the 19th and 20th centuries.

The main contribution is by Peter Collin, who unfolds the diverse uses of the concept of autonomy in German jurisprudence since the beginning of the 19th century. Two main lines become visible. On the one hand, the attempt to expand autonomy, i.e. to enlarge the circle of those collective actors who can claim autonomy, becomes recognisable. For many social groups, autonomy becomes a legitimate legitimisation narrative for achieving their own regulatory power. On the other hand, the discussion about autonomy is embedded in the debate about state sovereignty and the concept of law. It is noticeable that in particular the Germanist branch of jurisprudence has a preference for non-state regulatory powers, and thus for a pluralist understanding of law – as already made clear in the contribution by Seinecke in this volume. With the victory of the etatist concept of law, however, the meaning of autonomy disappears. In the present, it is more of a legal-political catchword without specific legal consequences.

The specificity of the German case becomes particularly clear in contrast with another continental European legal tradition. Michele Pifferi looks at the history of the concept of autonomy in Italy and makes three different accentuations visible. On the one hand, he analyses the use of the concept of

autonomy as a legal-political concept in the historical narrative that accompanied the Risorgimento. Here, the concept of autonomy was used to describe the constitutional tension between federalism and unitarianism; by referring to the autonomous character of the medieval *citá*, an attempt was made to mitigate state centralism. Furthermore, it played a major role in the private law debate. When the classical liberal conception of private law came into crisis, attempts were made to combine a reduction of private autonomy – related to the individual – with an expansion of the possibilities of collective regulation; this was particularly important for the development of labour law. In a very different way, the understanding of individual autonomy in criminal law came into crisis: doubts about the concept of free will went hand in hand with the advance of deterministic concepts.

Agustín Casagrande presents a historical-conceptual study of the reception of the concept of autonomy in both public and private law in Argentina. Similar to Pifferi, the public-political use of the term was determined by the debate on Argentine federalism in the 19th century. In the case of civil law, the concept of autonomy is mainly discussed in the crisis of the classical liberal concept of private law. This takes place in the context – parallels to the Italian development can be seen here – of the emergence of labour law. The attribution of collective autonomy is synonymous with an empowerment of those social groups that are structurally inferior under the rule of an individualistic understanding of private autonomy. However, in Argentina – as Collin also described for the German development – the term remained without major performative power after integration into the legal vocabulary from the middle of the 20th century. In recent decades, however, its use has increased exponentially in the discourse of feminist demands, social movements and especially in the inclusion of disabled people.

In the thematic field “Legal Person”, the contributions are dedicated to a legal category that is constitutive for the relationship between law and diversity. The category of the legal person is not only the basis of the private autonomy discussed above, it also levels the system of status differences of the Ancien Régime and promises general and equal freedom. At the same time, it is an abstractum that renders actual differences invisible, and its concrete design – especially gender-related – generates new categories of inequality. Discussions in this thematic field focus on the central question of whether and how this tension was discussed in the legal discourse of the 19th and 20th centuries.

Samuel Barbosa's main contribution deals with the Brazilian experience. To analyse the development of the category of legal personality, he uses the concept of the "mask" – a traditional but also sociological term – which serves as a model for observing three discursive formations underlying the construction of the legal subject. The first case examined is the definition of the person in Brazilian civil law discourses, which are later condensed into the legal code. There, the distinction between free men and slaves as well as between the *pater familias* and those who were subjected to the *patria potestas* (women, minors, etc.) appear trapped in a process that the author calls *subordinate subjects*. In the second strand of discourse examined, the category of the minor develops – a category that primarily allows state intervention towards those who are not integrated into the domestic sphere. This grouping is referred to as *disciplined subjects*. The third category refers to the status of the natives who were subjected to a process of assimilation by the emerging nation-state, through a transitional configuration that presented them as subjects to be civilised. This group is referred to by the author as *assimilated subjects*.

The commentary by Stephan Kirste, which deals with the German development, is located in the field of legal philosophy. First, he distinguishes between legal personhood, which "signifies the unity of rights attributed to a legal subject" and legal personality, which "is protected by a particular group of rights"; both "relate to each other like the potentiality of rights and actually having rights". Then he links Jellinek's status theory (*status negativus*, *status positivus*, *status activus*, *status subjectionis*) with this differentiation and thus renders the multidimensionality of the problem visible. However, when it comes to the question of who is granted these rights and for what reason, two lines of tradition become visible: a Kantian line, which refers to the inherent human dignity of every human being, and a positivist line originating from the historical school of law, which makes the holding of rights dependent on the decision of the respective legal system; the latter position, however, proved to be little resistant to the racially motivated deprivation of legal capacity during the National Socialist era. This was also the reason why, after 1945, human dignity became the overriding topos for the recognition of legal capacity, not only in Germany but all over the world.

Victoria Barnes's study of the experience of legal personality in England not only shows the diversity of treatment that goes beyond the level of citizenship – such as differential treatment relating gender, race, religion

or family status – but also involves a thorough analysis of the formation of the concept in the English legal system. Barnes presents, in addition to Blackstone’s jurisprudential sources, the various cases that resolved the problems of recognition of people’s rights, which were inscribed in ritual practices, customs and community knowledge that forged the relationship between nation-identity and legal personality. The dialogue she establishes with Barbosa is of special interest when it comes to the subject of slavery, where lines of demarcation between legal recognition are drawn on the basis of precise cases whose background also involves the historical-subjective positions of the magistrates who decided the central cases. As can be seen here, a reflection of national tradition, religion and juridical knowledge gives shape to diversities of treatment that are experienced in history.

In connection with the problems of legal recognition, a decisive aspect for the juridification effect of diversity appears, both in the legal-dogmatic representation and in the concrete practice of law: the legal language – a central factor that establishes processes of exclusion-inclusion in the context of the formation of national identity in the 19th and 20th centuries. Thus, the last block of studies – “Linguistic Diversity and the Language of Law” – considers this issue on the basis of a series of guiding questions that attempt to establish a comparative dialogue: how did linguistic diversity within a state manifest itself in the legal, administrative and judicial languages? Have laws been published in several languages? What mechanisms were used to ensure that minorities could also act in their language in court? How was the language of law used for purposes of assimilation or discrimination?

The exhaustive work that opens the series of debates corresponds to Gloria Lopera-Mesa, who exhibits a 200-year history of tensions between the search for the imposition of a monolingual system and the linguistic claims of the native peoples of Colombia. Not only does she note a marked difference with the traditions of denial of cultural (and linguistic) diversity in other Latin American countries, but she also shows the relationship between political, educational and religious projects that marked moments of identity recognition and denial for the inhabitants of the territory. The work shows, in turn, the instance of participation of non-state organisations in the regulation of the communities’ own forms of normative production, the various conceptual translations (for example, of the word “constitution”) into the native languages, but also the uses of the Spanish language to dominate and ridicule indigenous otherness. The Colombian experience

thus opens a field of inquiry that, far from being closed, demonstrates the importance of language and law in the construction of diversities (in a search for equality and identity).

For his part, Thomas Simon echoes Lópera-Mesa's proposal by analysing the case of Austria-Cisleithania during the second half of the 19th century, which can be read as a mirror that inverts the Colombian case. There, after analysing the problem of translation of the nation-state concept into German juridical-political knowledge, he postulates the difficulties of producing a single language for multi-linguistic and multi-ethnic imperial spaces. To this end, he observes three dimensions: firstly, the relationship between the form of normative production and the debate over the language of administrative communication, both at local and centralized levels; secondly, the constitutional recognitions of linguistic multiplicity; and, finally, the decisions of the administrative court and the Supreme Court, in which the right to linguistic determination of the legal subjects was claimed. It is clear that the discussion over language served as a base for structuring power relations, which can be seen in the interest in maintaining the German language in the administration, the local resistances and self-determinations and, finally, the disputes between the localities themselves that demanded a particular administrative language. The case studied by Simon demonstrates how the language of law is disseminated in the multiple sources of law in an intertwining of subjectivity and normativity.

Zülâl Muslu essays a profound response to Lópera-Mesa's work by locating the tension between language and law in the space of the Ottoman Empire and Turkey. Three perspectives are observed here. The first is a decolonial approach towards the knowledge and interpretations of the formation of law and the social-community experience of the various actors located in these political spaces. Thus, not only the formative process of the official-legal language (and its difficulties of establishment) is studied, but also the philosophical assumptions of law that, far from understanding the structural premise as equity-equality, designate justice as "aequitas". On the other hand, she states the impossibility of pre-understanding the legal phenomenon and its language from a liberal point of view that places the individual as the subject of imputation of the norm, occluding the fact that it is the community that is the addressee of the law. Finally, on entering the subject of the language of law, she observes similarities in the plane of colonial presuppositions and their labelling as semi-barbarians, and the

diverse processes in the temporalisation of the attempts at the formation of a nation-state. There, she examines not only the problematic of forming a unique language as state policy and disciplining, but also the resistance that will precipitate in the claims for the recognition of diversity in the present.

Finally, Stefan Kirmse conducts a comparative study with the Colombian case to focus on the imperial and post-imperial experience of Russia. In addition to recontextualising the problem of diversity in a radically diverse space of imperial construction, he expresses the way in which law is the “cutting edge of colonialism”. But far from expressing a single path of production of subjectivities, it is also the field of intercultural communication and resistance. In this context, it defines a double process similar to the Colombian one. The first was a tolerance based on liberal principles – structured in a contradiction with the conservatives’ principle of civilisation – which resulted in the recognition of diverse religious experiences: Catholics, Orthodox, Muslims, etc. The second moment is the passage to a policy of homogenisation with the promotion of a Russian and Orthodox culture, which changed after the 1905 revolution. All these trends had an impact on the language of law. However, social linguistic plurality could never be eradicated by law, but rather Kirmse’s work expresses the manner of the readjustment of the legal linguistic universe to the local experience of the Russian space, by means of interpreters, the local customs of the justices of the peace, etc.

4 Final remarks

If one tries to draw a conclusion, it should first be emphasised that a comprehensive finding is not possible. The present volume does not offer a systematic comparison between “Latin America” and “Europe”, as only the experiences of individual national legal cultures have been drawn upon for each topic. Nevertheless, certain generalised statements can be made.

When Latin America and Europe entered modernity from the beginning of the 19th century, they had to cope with a different legal cultural heritage. The starting point in both continents was a stratified society. Differences in status as a marker of diversity can be found in Latin America as well as in Europe. In colonial Latin America, however, there is a much stronger emphasis on racial-ethnic differentiations, which also manifest themselves in legal differentiations.

At the beginning of the 19th century, or after the attainment of independence, a monistic fundamental tone initially prevailed. The dominant concept is a uniform law with a uniform citizenship and a legal subjectivity that is the same for all people; comprehensive codifications rather than special legal orders are to shape the law. In the course of the 19th century, constitutions were enacted everywhere that guaranteed equality, at least in principle.

But, apart from the fact that the legal postulate of equality was not enforced everywhere either – especially where slavery still prevailed until the second half of the 19th century – it created new inequality. This is particularly evident in Latin America. First of all, there is a progressing official repression of indigenous customary law, although this is not equally consistent in all Latin American states. The scope for individual and collective action was thus restricted for those groups that did not correspond to a certain understanding of civilisation. At the same time, the ruling elite personified itself in the form of the individual who was adequate to the modern legal system. Existing social, ethnic and racial differences were made invisible and petrified at the same time. At first glance, the same thing happened in Europe: here, too, modern legislation displaced customary law and special corporative law. However, especially in Central and Western Europe, standardisation processes had already begun well before the beginning of the 19th century and racial-ethnic criteria played only a relatively minor role outside the colonies.

Important differences can also be observed in the development of an egalitarian civic identity – but less so in the development of civic rights. Here, the development was largely parallel: just as in Europe, the active exercise of civic rights was originally largely linked to an education and wealth census. The consistent elimination of discrimination in voting rights only took place in the course of the 20th century. The same applies to the civic status of women. Serious differences are more noticeable in the discourses on the formation of national identity. In Latin American countries, these were long characterised by the assumption of a supposed “modernisation deficit”, an idea which itself derived from the dominant “civilisational” model that implied racial and ethnic gradations. In subsequent periods, such ideas would reemerge in the context of immigration policy. In 19th-century Europe, too, the formation of national identity was not without friction.

However, ethnic-racial differences played less of a role than different regional identities or linguistic differences.

At the beginning of the 20th century, developments occurred that revealed further fundamental differences between Europe and Latin America. On the one hand, this concerned the effects of the rule of dictatorial or authoritarian systems. In Latin America, the emergence of authoritarian regimes was strongly linked to the revival of corporatist ideas of organisation. The allocation of opportunities for participation was not based on egalitarian criteria, but on the assessment of the weight of certain social groups and institutions. Similar corporatist patterns can also be found in dictatorial and authoritarian regimes in 20th-century Europe. The National Socialist regime and the communist dictatorships, however, took different paths. National Socialism eliminated egalitarianism and created – also on the level of law – a radical order of ethnic-racial differentiation, discrimination and elimination. The communist regimes, on the other hand, created a system of privileges and disadvantages that were largely, if not exclusively, based on membership of economically defined groups and classes – at least as far as important areas of life were concerned.

If, in terms of a ruling ideology, the 19th century can be seen as the century of classical liberalism based on the idea of legal equality, the 20th century can be described as a time in which progressive egalitarianism and increasing differentiation went hand in hand. On the one hand, we are dealing with a partially radical development of functional differentiation. The economy, politics, science, law, etc. perfected their own rationalities, whose autonomy was effectively secured by legal means. At the same time, processes of equalisation that had already begun in the 19th century were continued: the wealth and education census disappeared from the electoral law, racial discrimination was banned, and the equality of women progressed. On the other hand, new group and action complexes were identified that showed a special need for protection, and thus also created the justification for the law to make distinctions. An important strand in this development is the discovery of the working class as a group in particular need of regulation. The creation of a new labour law, the establishment of new forms of institutionalised political-economic participation and – at least in its origins – the creation of a public-law system of health, pension, accident and unemployment insurance were linked to this – a process that began in Europe but subsequently spread to Latin America; here, forms of worker

protection and worker participation could certainly be reconciled with authoritarian political structures. Democratisation and with it the need for sensitivity to the needs of other vulnerable groups, but also a more elaborate understanding of human rights, created further group-related special legal orders.

Two characteristics in particular are formative for recent times. In Latin America, it was the recognition of a separate identity of indigenous groups, leading to the recognition of far-reaching – albeit different from country to country – autonomy rights, which in some countries has reached the constitutional level in the declaration of a “plurinational state”. This also appears in recent theoretical discussions on Latin American legal pluralism⁴⁷ and the uses of the past that are deduced therefrom,⁴⁸ or in the reading of multi-normativity as an emergent of the recognition of the limits of state law.⁴⁹ In Europe, it was the realisation that an immigration society had emerged, resulting in ethnic, cultural and religious plurality; added to this was the growing weight and further differentiation of gender and sexual identity, but also the growing sensitivity to those disadvantages that arose from disability.

The last remarks once again demonstrate how important it is not to understand diversity in a uniform sense. If one wants to make the term diversity fruitful in legal history, it should rather be understood in the sense of a concept of reflection. Diversity in its legal consequences can then only be understood through differentiation and contextualisation. The common denominator is that it is about social activities in which social differences are marked as legally relevant. From this starting point, legal developments that do not fall into the scheme of a modern understanding of diversity can also be examined. Above all, such an understanding of diversity is suitable for putting traditional legal-historical narratives to the test.

47 HERZOG (2021).

48 DUVE (2017b).

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First Part

Thinking on Diversity and Law

Section I

National Traditions of Social Theoretical Contouring of Social Differences

Social Differentiation, Inequality, and Diversity in the Sociological Theory of Law – An Outline of the German Debate

1 Introduction

Both general sociology and the sociology of the law in particular have dealt with questions of social differentiation from their very beginning. The notion of social differentiation, therefore, is one of the central hallmarks of the discipline. Sociology has, however, developed a wide variety of theories and concepts around the idea of differentiation. Such concepts, as will be argued in this article, present themselves as being essentially contested insofar as they are built upon varying, often contradictory, theoretical fundamentals and therefore embody profoundly incongruous and often opposing perspectives. Some of them are connected with the notion of social inequality, others refer to the basic need for social integration, and others still focus on the interrelation of autonomous social fields or spheres. Moreover, these conceptual disparities, which will be the topic of this article, are based on deep-rooted theoretical commitments to concepts such as action, communication, rationality, practice, power, and order –, to mention only a few.

Against this background, the following considerations will give a brief account of sociological theories of differentiation and of the relevance of social inequalities and the semantics of ‘diversity’ with respect to the law. ‘Diversity’, as will be later demonstrated, challenges the identity of the law only in one very specific regard, namely insofar as it confronts it with multi-normativity and thereby with difficult questions of normative re-entry. This is due to the fact that ‘diversity’, in terms of cultural semantics – in contrast to inequality and differentiation as social-structural phenomena – tackles the law on normative ambiguity and vagueness, which raises difficulties with respect to positive law. Whether and to what extent the lessons learnt from the debate on legal pluralism may help in addressing diversity remains to be seen in future debate.

All the following accounts will be given from a limited perspective, namely from that of sociological theory as it has been developing in Germany since the late 19th century and, more specifically, from the perspective of the sociology of law in the German-speaking scholarly arena. Such limitation is justified by the aim of the workshop being to compare European and Latin-American legal thinking. Against this backdrop, the description will enable a comparison to be made between different national legal cultures, insofar as such might, in the best case, be helpful in terms of dealing with regional diversity in this respect.

Speaking about scientific theories from a scientific point of view means to engage in the discourse of reflective theories. The following analysis will focus on scientific concepts, discourses, and models of social differentiation in addition to inequality, and diversity with a particular interest in the law. Such interpretative patterns can be summarized under the general term 'reflective theories'. This is because they are scientific semantics, which reflect upon a specific societal field or sub-system. They observe societal activities through the lens of (social) science and offer a coherent description of the respective field. Such descriptions contribute significantly to the constitution of related social practices. Insofar as this assumption holds true, reflective theories and social practice lie on a continuum and mutually influence one another. Reflective theories do not determine practices, but they do, however, illuminate their social meaning and thus add an important aspect to their sociological understanding.

Every reflective theory will have to take into consideration the plurality of its subjects, i.e. the plurality of sociological theories of differentiation, inequality, and diversity in particular. Referring to the latter, diversity can be conceived of as an analytical as well as a normative term,¹ a duality rooted deeply in the condition of the sociology of law itself. The socio-legal field has been emerging from this distinction as a reflective theory, and it has been profoundly shaped by this distinction from the outset and through to contemporary debates. Any reflection on the sociology of law will, therefore, have to take this situation into account.

To a certain extent, the distinction between the empirical and normative perspective parallels the one between horizontal and vertical modes of social

1 DUVE (2013) 2.

differentiation,² although the spatial metaphor seems to be somewhat unspecific and partially misleading. Moreover, it refers to the character of the respective theory rather than to its subject area. Nevertheless, one could argue that normative theories focus on vertical differentiation, and on power and resource imbalances in addition to tensions between societal structures and individual subjects, whereas the empirical ones, in contrast, are more concerned with horizontal modes of differentiation, division of labour, different rationalities, social circles, and functional differences. The mere distinction between the two theoretical perspectives however neglects a second relevant dimension, namely conceptual orientation. In this dimension, social theories are structured according to their respective model of social order. In this respect, we can distinguish between theories of identity and theories of difference. The former are geared toward societal integrity being understood as a representation of a fundamental identity. The latter emphasize the leading role of differences in the formation of social order.

2 Four discourses of social differentiation

The suggestion, therefore, is to distinguish between different discourses of social differentiation according to two analytical dimensions, namely that of the theoretical perspective or mode of approach on the one hand and, on the other, the dimension of the particular model of social order taken by a scientific theory. Both dimensions together structure the field of reflective theories into four specific discourses. They form the ordering principle for the following argumentation. Needless to say, these discourses are described somewhat expansively as positions in the entire field of scientific theories.³ Being, as such, positions in a social field, they do not represent sharply delimited phenomena. Instead, there are overlapping zones between such positions and the semantic ‘bridges’ between them, which become visible as soon as one detects particular authors in social and socio-legal theory. In what follows, these discourses will nevertheless be presented in a more sharply contoured manner in order to describe ‘clear cases’ that are intended to support the readers’ understanding of the overall argument.

2 HILLEBRANDT (2001).

3 BOURDIEU (1987); BORA (2009); BORA/HAUSENDORF (2006, 2009).

	normative	empirical
model of social order		
identity	2 equality	1 integration
difference	3 alterity	4 differentiation

Figure: Theories of social Differentiation: Four-Discourses model of social science

In the first dimension, I suggest distinguishing between normative and empirical sciences. Both types of scientific discourse can produce either an identity or a difference model of social order. In the same way, both types of scientific discourse in the second dimension – the model of social order – can speak either from the perspective of empirical science (i. e. from a more external position of a scientific observer) or from a normative perspective (i. e. from a rather internal position of a participant in societal struggles, conflicts and evaluative controversies). As a result, we can distinguish between four discourses of differentiation, each of which having a particular form, namely integration, equality, alterity, or differentiation. Integration is the central concern of empirical sociology with a model of social order as identity. Equality is the centre of interest in normative sociology with an identity-oriented model of social order. Alterity, in turn, is the key concept of normative sociology connected with social order as difference, and finally, the fourth discourse arises from the combination of empirical sociology with a difference model of social order. The four discourses will form the organisational basis for the following analysis.

Before the details are explored, it should, however, be emphasized that the sociology of law in the German-speaking academic world does not refer systematically to *sociological theory* in general – systems theory and critical

theory being the only two exceptions – nor to concepts of social differentiation or diversity. It does refer to questions of inequality, but, even so, from a rather normative perspective, and it has, furthermore, not yet established an interest in the concept of diversity. It should, moreover, be noted at this point that there is no single or uniform sociology of law in Germany. Instead, we find a polyphony of voices dealing with different aspects of law from a sociological perspective.⁴ These perspectives are associated with the level of reflective theories and can be characterized primarily by their concept of interdisciplinarity, the relationship between operation and observation, system and environment, or, in other words, scientific theory and social practice. They are not principally defined in relation to a universal theory, i. e. to a sociological theory as a coherent and extensive (comprehensive, encompassing) system of descriptive and explanatory propositions about a well-defined subject area (society in our case). Textbooks on the sociology of law usually refer to sociological theory – if at all – as classical sociology, addressing, apart from Ehrlich and Geiger, mainly Marx, Durkheim, Weber, and Luhmann’s systems theory. The latter often serves as the only contemporary reference.⁵ Besides that, the textbooks regularly mention a number of middle-range approaches that have become relevant to criminal sociology and criminology.⁶ A number of sociological theorists are, to all intents and purposes, completely missing from the majority of text books, such as those of Bourdieu, Simmel, or Mannheim, for instance. The international discussion might perhaps prove to be somewhat different.⁷ The textbooks do not, therefore, usually refer to core elements of sociological theories, such as differentiation. Buckel’s and Fischer-Lescano’s book (2006) on new legal theories, for instance, contains only three rather marginal references to “differentiation” or “differential” in the entire work.

The concept of *social ‘differentiation’* is one of the theoretical ideas that have characterized sociological theory since its beginning, gaining theoretical knowledge of the structure of society.⁸ Schimank⁹ mentions five general

4 BORA (2016).

5 RAISER (2013); RÖHL (1987).

6 BAER (2011); STRUCK (2011).

7 Cf. GUIBENTIF (2010), although a stand-alone volume in the international debate and a monograph, it is not a textbook.

8 HILLEBRANDT (2001) 66.

9 SCHIMANK (1996) 274 ff.

characteristics of modern society: functional differentiation, growth, regulation, organisation, and individualisation, often described in a way such that differentiation and growth would produce social problems, whereas organisation and regulation would aim to limit these problems. In this scheme, individualisation is often understood as an unintentional consequence of differentiation, which gives rise to a strong opposition between individuals and societal structures. Taking these narratives into consideration, the following descriptions obviously do not present profoundly new insights, but rather they assemble the essence of a more or less consolidated development in sociological thinking over the last 150 years, as can be found in any textbook on sociological theory. The purpose of the description is to prepare the ground for a systematic account of the meaning and relevance of 'diversity' in the context of sociological theories of differentiation and inequality. The task is to identify certain patterns of a particular German scholarly culture – if such a tradition exists at all – and to call for aspects of relevance for the description and analysis of modern society. Theories of differentiation, as with most probably all sociological theories, are closely connected to 'great names' and classical texts.¹⁰ The following description will only indirectly follow such systematisation and will focus primarily on the four discursive formations described above, namely integration, equality, alterity, and differentiation (1–4), leading to a few remarks on law and diversity (5).

2.1 Integration

The first discourse represents sociology as an empirical science combined with a model of social order as identity. It can be identified in various theories of societal differentiation and their concern for the integration of society.

Sociology as an empirical science (*Erfahrungswissenschaft*) dealt with questions of social differentiation in the beginning mainly in the form of the division of labour, from whence it more or less directly raised the question of integration as a basic requirement resulting from differentiation. In many cases, the law has been seen as an important instrument for or as an aspect of social integration.

10 SCHIMANK (1996) 15 ff.

Emile Durkheim is probably the most prominent example for this first discourse combining empirical science and a model of social order as identity. The division of labour had already been addressed as a general principle of social differentiation and put into a historical perspective by Adam Smith and Herbert Spencer. While Spencer described a development from “incoherent homogeneity to coherent inhomogeneity”,¹¹ Durkheim transcends Spencer’s political liberalism by developing a strictly sociological concept of societal change, which is characterized by the two fundamental forms of social solidarity, namely mechanic and organic.¹² Social differentiation as division of labour develops from segmentary, barely differentiated to modern, highly differentiated forms. Differentiation is produced by social density and competition.¹³ Social integration, then, takes the form of solidarity, developing from mechanic to organic forms.¹⁴ Durkheim was perhaps more interested in integration than in differentiation.¹⁵ Deficits in integration are described as forms of anomy. Durkheim’s relevance to German sociology of law can be understood against this background. It lies mainly in the theory of anomy and in criminology, often relating to Merton and to questions of social integration, issues which are today strongly linked to diversity.¹⁶

It is noteworthy that, for Durkheim himself, the law plays only a secondary role in his concept of social integration – in contrast to a widespread narrative in the socio-legal literature. In his early text on moral science at German universities, Durkheim¹⁷ was influenced by Jhering’s model of jurisprudence as social science, starting with a primordial unity of religion, morality, and law, which would later be destroyed by social differentiation. In “Les règles de la méthode sociologique”,¹⁸ we find a normative construction of the basic social facts (*faits sociaux*).¹⁹ In these early texts, normativity is a basic structure of social life. The book on the division of labour, in

11 Cf. RÜSCHEMEYER (1985) 167.

12 DURKHEIM (1977 [1893]).

13 DURKHEIM (1977 [1893]) 330.

14 DURKHEIM (1977 [1893]).

15 DURKHEIM (1977 [1893]); TYRELL (1985).

16 HEITMEYER (2015).

17 DURKHEIM (1887).

18 DURKHEIM (1895).

19 GEIGER (1968) 19 criticized Durkheim’s “sociologism” and related approaches, for instance GUMPCOWICZ (1885).

contrast (Durkheim 1893), demonstrates the fundamental problem of Durkheim's theory, namely the difficulty of formulating a precise concept of the mechanisms of basic normativity, particularly the normative integration of society, and of describing such mechanisms in sociologically defined terms. Solidarity as a moral phenomenon is not directly measurable and observable. It can only be deduced from social symbols, among which the law is the most prominent.²⁰ The law, in and of itself, is no more than an indicator of social solidarity in Durkheim's theory. Although constructed drawing on the concept of solidarity, Durkheim's sociological theory, therefore, remains rather under-complex in terms of understanding of the main categories (segmentary and functional differentiation, repressive and substitutive sanctions). This is, in its nucleus, also Luhmann's critique of Durkheim's sociology.²¹ Like Henry Sumner Maine, as Luhmann argues, Durkheim also over-focuses on the social elasticity deriving from contractual forms. Moreover, as he wrote, does Durkheim not reconstruct the emergence of law and the phenomenon of ought in a sociologically convincing way? In contrast to a widespread account,²² one would not describe Durkheim as a genuine sociologist of law.²³

It is, therefore, no great surprise to see that, in Durkheim's later work, apart from solidarity – and perhaps even more important than this mechanism – various intermediary institutions and professions²⁴ have been taken into consideration as core integrative mechanisms of society. On a more general level, however, Durkheim's functional theory, in particular his methodological approach in functional analysis, has widely influenced sociological thinking, also in the field of sociology of law. His theory of social differentiation has been superseded by more complex concepts, as will be later argued.

Max Weber, in contrast to Durkheim, drafted a concept of differentiation that is characterized by a whole variety of forms and not only by the distinction of two leading ones. Western societies, as he claimed, are characterized by a specific type of rationality, which results in societal differentia-

20 DURKHEIM (1977 [1893]) 111.

21 LUHMANN (1972) 15–18.

22 RAISER (2013) 59–70; RÖHL (1987), § 5; BAER (2011) 40–41.

23 Comparable difficulties could be seen in the work of Ferdinand Tönnies.

24 DURKHEIM (1973 [1902]).

tion. Modern capitalism in economy, occidental rationality in science, arts, politics, and law are manifestations of rationality in this sense. Instrumental and value rationality are the two characteristics of the universal form. Different societal spheres, namely religion, economy, politics, aesthetics, eroticism, and intellectualism²⁵ develop their respective forms of value rationality, thereby differentiating themselves from each other. They cannot be reconciled by religion²⁶ as had been the case in pre-modern societies. In modern society, in contrast, integration is guaranteed by legal power with a bureaucratic administration.²⁷ The rule of law, in other words, produces social integration as political integration in the form of rational administration, formal law and constitution²⁸ under the condition of a categorically differentiated social life. Weber's ambivalent attitude, on the other hand, with respect to the modern state and its rationality, has often been mentioned. The iron cage of formal law and administrative power was a lasting source of concern in his work.

What is less discussed is the fact that Weber, on a theoretical level, did not provide a very clear concept of law or of normativity in general. Although his sociology of law is undoubtedly a theory of internal legal rationalisation, Weber always described it as a consequence of external, technological, and economic processes of rationalisation. The long chapter VII on the sociology of law in "Wirtschaft und Gesellschaft"²⁹ demonstrates this fact in various aspects and with a plethora of empirical material. Additionally, the short paragraph on the sociology of law at the beginning of part two of the book (181–197) is rather instructive in this respect. That said, it clearly demarcates empirical and normative observation, thereby contrasting with Eugen Ehrlich and building a much stronger fundament for the sociology of law. On the other hand, the passage surprises with a very farsighted perspective on the sociology of law, describing law and economy as autonomous fields with mutual channels of influence depending on the respective internal operational mechanisms. The societal function of the law is described as producing the reliability of expectations (*Kalkulierbarkeit* in Weber's terms). These few remarks anticipate insights into the later development of sociology in

25 WEBER (1988 [1920]) 536–573.

26 WEBER (1988 [1920]) 541 f.

27 WEBER (1972 [1922]) 124.

28 MÜNCH (1995) 8.

29 WEBER (1972 [1922]) 387–513.

general and of the sociology of law in particular – especially in respect of the theory of differentiation as regards autonomous societal spheres.

However, a weak point in Weber's sociology – at least from the perspective of the sociology of law – is his definition of law, or, more precisely, lack of such. He invests much attention in the difference between compulsion and recognition theories. The connection between the law and a central apparatus of power, however, only refers to the possibility of law enforcement. It does not imply the factual exertion of power in every case, nor does it mean that compliant behaviour only occurs because of the possibility of coercion. Besides that, Weber refers to the normative character of the law (the "ought", *Sollenscharakter*), though without further clarifying the social foundations of normativity. Theodor Geiger (1964) and Niklas Luhmann (1972) developed such a theoretical fundament for the sociological theory of law. Moreover, Weber's frequently criticized concept of rationality, is very narrow, focusing mainly on instrumental rationality.³⁰ Habermas used this argument for the reconstruction of critical theory into a theory of communicative rationality, combined with a concept of differentiation, borrowed from Parsons's structural-functionalist theory of societal differentiation, as we shall see later.

All in all, Weber's relevance in the German sociology of law is still remarkable. After a significantly slow uptake, his work became rather prominent in Germany during the 1960s. His theory of differentiation and of rational authority, his concept of bureaucratic rationality including a high estimation of the rule of law with its dominance of formal principles according to his theory of rationalisation, have strongly influenced socio-legal discussions.³¹ Against this background, a certain critique of a presumed (or factual) re-materialisation of the law, especially in the context of the modern welfare state and developments in environmental and human-rights law, for example has also been formed by Weber's appraisal of formal rationality.

With respect to the aforementioned shortcomings in Weber's theory of law, namely the terminological and conceptual vagueness, Theodor Geiger (1964) preceded a relevant step. In his behavioural scientific approach, distancing himself from philosophical positions based on subjective intention-

30 HABERMAS (1981).

31 CHAZEL (2016); GEPHART (1993); TREIBER (2017); RÖHL (2018).

ality,³² he blazed the trail for a post-subjectivist sociology beyond action theories. Although tying Weber's position in the *Werturteilsstreit* to the notion of "practical value nihilism", Geiger nevertheless cuts back Weber's hermeneutic dimension so rooted in historicism and its liberal-arts (*geisteswissenschaftlich*) tradition. Geiger's book is the first systematic approach to a sociological theory of law. The behaviourist varnish covering the argumentation appears somewhat disturbing from today's point of view. Nevertheless, it cannot discount the theoretical value of Geiger's theory, which is surprisingly modern, if one takes a closer look. When addressing the origins of normativity, he points beyond the behaviouristic link of norm and sanction,³³ developing a perspective that would become more common much later after the linguistic turn in the social sciences: Firstly, normative force is a product of social force; social reality faces actors with the necessity of choosing between compliance and deviance with the consequence of a reaction from the social group (*Gruppenöffentlichkeit*).³⁴ Secondly, normative obligation is the consequence of social interaction; later in sociology, the term 'interaction' is replaced by 'communication'. Thirdly, normative force and obligation result from expectations; social interdependence manifests itself in the expectations of group members.³⁵ With these terminological and conceptual stipulations, Geiger laid the foundation for a modern sociology of law, even if he himself did not foresee later developments.

With respect to our central issue of differentiation, however, Geiger's theory remains completely underexposed. Social differentiation does not occur in a systematic way in the course of his argumentation. In a rather marginal manner, he writes about social milieux and develops a model of social order that is somehow built on the concept of groups.³⁶ In this respect, his position is quite similar to Eugen Ehrlich's social theory deeply rooted in social models of the 19th century with its basic concept of associations (*Verbände*), which Weber had already long left behind. To this extent, we can find faint traces of differentiation-theoretical reasoning in Geiger's work. Against such slight social differences, however, the idea of

32 GEIGER (1964) 371.

33 GEIGER (1964) 82 ff.

34 GEIGER (1964) 83.

35 GEIGER (1964).

36 GEIGER (1964) 128 ff.

a (normative) identity of society is given strong priority. This identity of society can be found in an overarching concept of law, defined by sanctions.³⁷ After all, this concept of law, grounded in behavioural regularity along with sanctions, bargains away the chance to analyse the social sources of norms.³⁸

A much stronger theory of differentiation, but with no more than a few fleeting sideglances at law, is connected with the name of Georg Simmel. Dealing with the process of individualisation, Simmel interpreted the idea of the modern individual as the result of the crossing of social circles.³⁹ A progressive number and distinctiveness of social roles, to which every person is attached, characterizes modern life. Differentiation processes are triggered by the mechanism of reduced effort (*Kraftersparnis*), producing evolutionary advantages.⁴⁰ The differentiated roles belong to respective social groups, or circles, as Simmel describes them. The circles to which a person belongs form a coordinate system. The more roles relevant to individuals, the less probable it is that they will suit any other person whom, in other words, these many circles encompass at any other single point.⁴¹ Against the background of such an advanced individualisation, however, Simmel – like Durkheim – stresses that individualisation is the basis of social integration. It enables persons to act responsibly with respect to generally accepted social norms. A person's individuality can be understood as the result of role differentiation on the one hand and, on the other, as a means for coping with problems of social integration resulting precisely from differentiation caused by individualisation.⁴² The first aspect is reflected in the idea of the crossing of social circles. The second leads to sociological theories of conflict that also became relevant to the sociology of law after 1945.⁴³ Differentiation and integration are thus balanced in an unstable equilibrium. Integration is conceived of as a conflation of differentiated phenomena on a higher level that can be the starting point for new differentiation.⁴⁴

37 POPITZ (1980).

38 LUHMANN (1972).

39 SIMMEL (1890); SIMMEL (1908) 305–340.

40 SIMMEL (1890) 258–259.

41 Cf. SIMMEL (1908) 312.

42 SCHIMANK (1996) 53.

43 DAHRENDORF (1958).

44 SIMMEL (1890) 283–285.

Talcott Parsons, in contrast to the aforementioned classical authors, formulated a theory of societal differentiation constructed as a whole from the perspective of integration. Parsons' theoretical achievement, as Werner Gephart argued, does not consist of a theory of differentiation with an element of counteracting integration, but rather of the idea of interpenetration, a mechanism covering the whole universe of social phenomena and building the normative pattern and basic empirical structure of modern society.⁴⁵ Parsons's theory of societal differentiation, against this backdrop, is primarily a theory of *normative integration via social inclusion*.⁴⁶

Parsons's work is characterized by three major phases, namely the voluntaristic theory of action, structural functionalism, and the theory of social evolution. For all these phases, the idea of a normative integration of society is the common denominator.

In "The Structure of social action" (1937), Parsons criticizes utilitarian positions and queries: "How is social order possible?," this in a voluntaristic theory of action in combination with a normativistic theory of social order. In concrete terms, the link between the two parts of theory is formed by the idea of "unit acts" within an "action frame of reference",⁴⁷ consisting of an actor, goals of action, the situation, and the norms and values of the act. This idea of value orientation is carried along in this second step of Parsons's theoretical path, the theory of structural functionalism. Together with Robert Bales and Edward Shils, Parsons designs the well known AGIL scheme, combining the two dimensions symbolic complexity and complexity of action, and consisting of four basic functions, namely adaptation, goal attainment, integration, and latent pattern maintenance.⁴⁸ The scheme serves in the beginning as an action frame of reference. It later works within a complex of mutually convoluted levels of social phenomena, such as the *conditio humana*, the action system, the social system, etc. The task of integration is attributed to a subsystem of society, namely the societal community. Its function consists of creating loyalty *vis-à-vis* society as a whole. Such a form of social bonds emerges if a uniform, coherent, and collective normative structure guarantees the integration of society. Integration, however, is

45 GEPHART (1993) 255.

46 MÜNCH (1995) 18 f.; see also BORA (1999), ch. 1.3.

47 PARSONS (1951) 3.

48 PARSONS et al. (1953).

not only a function within the AGIL scheme. It is also a balanced relationship between the four functions of the scheme⁴⁹ in the form of “double interchanges”, i.e. mutual dependence between the different systems delivered by symbolically generalized media of communication and cybernetic control hierarchies.⁵⁰

At the same time, the basic distinction between actor and situation is replaced with the one between system and environment.⁵¹ Society is one of these levels of interrelated systems that can be described in terms of evolution.⁵² Evolution, according to Parsons, consists of four basic mechanisms, namely differentiation, adaptive upgrading, inclusion, and value generalisation. Inclusion is an evolutionary mechanism embedded in the system of societal community. It makes for the involvement of new units, structures, and mechanisms in the normative framework of the community. Parsons refers principally to “citizenship”, i.e. the evolving system of civic rights during the English and American revolutions.⁵³ With increasing societal differentiation individuals and groups can no longer be integrated by traditional roles and distinctions. As a result, “differentiation demands the inclusion of previously excluded groups into the general system of society as soon as these groups have developed legitimate competences that contribute to the functioning of the system”.⁵⁴ The idea of *integration by inclusion* accordingly finds its genuine expression.

In this respect, Parsons as well as Durkheim are representing a theory of societal differentiation that is strongly shaped by the central concern over solidary, normative integration of society.⁵⁵ Weber, in contrast, focused on the formal rationality of modern law, when searching for an integrating mechanism in the world of differentiated value spheres. Both Weber and Parsons present, like Simmel, and Geiger, empirical theories comprising

49 SCHIMANK (1996) 103.

50 PARSONS/SMELSER (1956). At this point, Parsons in a certain way transcends the borders of a theory of normative integration. Like Simmel, he aims for an equilibrium of differentiated functions. Such an idea already comes close to models of social order as difference, as we shall see later.

51 PARSONS (1951).

52 PARSONS (1966).

53 PARSONS (1971) 92–94; see also MARSHALL (1964).

54 PARSONS (1966) 40, my translation from the German edition.

55 MÜNCH (1995) 18.

models of normative integration. They thus represent identity models of social order within the framework of an empirical sociological theory of the law.

Their relevance to contemporary sociology of law, however, is rather limited. Durkheim's theory triggers only more or less symbolic references in German sociology of law. Very few methodological traces can be found in this respect, whereas functionalist approaches today are mainly part of sociological systems theory. Weber, in contrast, has become more relevant in German sociology of law since 1945. His theories of value spheres, of rational authority, and the bureaucratic rationality, of the rule of law as dominant of formal principles according to his theory of rationalisation have influenced quite some generations of socio-legal scholars. Against this background can be detected a certain critique of a presumed (or factual) re-materialisation of the law, especially, for example, in the context of the modern welfare state and developments in environmental and human-rights law. Finally, Parsons's theory of the normative integration of society is still a rather vivid concept, perhaps the most influential in this part.⁵⁶ It has spread into common sense (*Zeitgeist*) in debates about inclusion, cohesion, and social integration, often without reference to the systematic problems in Parsons's theory (or to the theory at all). The work of Richard Münch must be mentioned here, however, as an outstanding and singular exception keeping alive Parsonian theory with a remarkable number of publications, some of them dedicated to law in particular.⁵⁷

2.2 Equality

The second discourse represents sociology as a normative theory combined with a model of social order as identity. Societal differentiation, in this respect, occurs, above all, as structural inequality.

While Parsons as an example of the first discourse already shows a connection and a transition between the empirical and the normative discourses on integration, the second discourse focuses entirely on a normative understanding of integration. It presupposes a model of society as identity and connects it to a normative impetus, often in combination with a theory of

⁵⁶ DAMM (1976).

⁵⁷ MÜNCH (1976, 1980, 1982, 1985, 1992, 1995).

universal history or of social evolution. This temporal dimension typically exposes a teleological moment, a presupposed final stage of historical development which delivers the frame of reference for the evaluation of contemporary society. These approaches are, therefore, also typically combined with concepts of justice as equality. Differentiated societies can be described as unequal in many instances. In this respect, theories of differentiation and theories of social inequality are equiprimordial.⁵⁸

After Kant and Max Weber, one could suspect it to be a categorical mistake to speak of normative sociological theory. Such an argument, however, would obviously dismiss the fact that sociological theory has largely consisted of normative analyses by claiming that the empirical study of societal phenomena could instantaneously lead to normative assertions about the justifiable shaping of society. In the Hegelian and Marxist tradition, this conviction was the common point of reference as well as in later theories such as the Frankfurt school, or in Bourdieu's understanding of new capitalism. All these approaches stand for the combination of a normative theory and a model of social identity.

Karl Marx's theory of society, in its nucleus, serves as the reference point for the normative discourse of societal identity. Therefore, despite its prominence, a very few and sketchy remarks may be appropriate in order to call to mind the basic structure of Marx's theory, its implications for the theory of differentiation, and its consequences for legal theory.

Marx's social theory is based on an economic analysis of *class structures* combined with a theory of social evolution and an early form of the sociology of knowledge framed as *Ideologiekritik*.⁵⁹ A sociological analysis of class relations, the ubiquitous conflict between the two social classes that are formed by the fundamental contradiction in the means of production, and the respective societal complements shapes the theory of societal differentiation.⁶⁰ In contrast to Durkheim and other differentiation theories, for Marx the class contradiction provokes a fundamental normative case for overcoming the economic disruption of society. The figure in which this argument is embedded, takes the form of historical materialism, a theory of social evolution claiming that the dialectic tension between the social

58 SCHIMANK (1996) 9.

59 MARX/ENGELS (1966).

60 MARX/ENGELS, MEW, vol. 23–25.

classes will inevitably be sublated in communist society. The class difference, in other words, has to be transformed into the harmonic identity of future society (“From each according to his ability, to each according to his needs”).⁶¹ Apart from his critique of political economy and the accompanying model of the class structure of society, a second distinction has become a hallmark of Marx’s concept of societal differentiation, namely the distinction between base and superstructure forming the core of his criticism of ideology. Like the fetish character of a commodity, which veils the effort of human labour creating the practical value of a product (*Gebrauchswert*) and puts forward the exchange value (*Tauschwert*) as a mere self-deceit in societal life, also on the level of self-description, the social reality of the economic system is hidden behind the ideological superstructure of the cultural and political system. The fundamental disparity of an economic base and social superstructure is one of the origins of social conflicts (MEW, vol. 13, 9).

With respect to law, Marx, admittedly, did not provide us with more than a few rather marginal comments, the most prominent of which is the critique of the law on wood theft in the “*Rheinische Zeitung*”.⁶² For Marx, the law belongs to the ideological sphere of the societal superstructure. This theoretical position involves the determination of the law by its environment, i. e. by society. The law only mirrors the structure of bourgeois society. It is a form of ideology veiling real class interests behind a formal terminological architecture. The positive law is only a formal cover over the materiality of class relations based on different modes of production. Equal rights in law disguise unequal relations of production and therefore represent inequality, as all forms of law (“Dies gleiche Recht ist ungleiches Recht für ungleiche Arbeit. [...] Es ist daher ein Recht der Ungleichheit, seinem Inhalt nach, wie alles Recht.”)⁶³ In a famous quote, Anatol France speaks of the equality of the law forbidding poor and rich people – equally – to sleep under bridges, to beg, and to steal bread (“... [die] majestätische Gleichheit des Gesetzes verbietet es Reichen wie Armen gleichermaßen, unter Brücken zu schlafen, auf den Straßen zu betteln und Brot zu stehlen”).⁶⁴

61 MARX/ENGELS, MEW, vol. 3, 35; MEW, vol. 19, 21.

62 MARX/ENGELS, MEW, vol. 1, 109–147.

63 MARX/ENGELS, MEW, vol. 19, 19.

64 FRANCE (2003 [1919]) 112.

This theoretical model pervades sociological theories of law, from early critical theory to the sociology of courts or critical legal studies. It left traces in general sociology, for instance in Foucault's analysis of micro-politics as well as in Pierre Bourdieu's term *capital* and his understanding of power as the main field structure and *illusio* as the ideology of field knowledge. Inequality was a central reference in Marx's work, just as it is in Pierre Bourdieu's sociology (for the following see Hillebrandt).⁶⁵ Bourdieu subscribes in many respects to Marx's ideas. He, however, expands the purely economic perspective that had marked Marx's work in favour of a "mysterious cross ratio"⁶⁶ between *habitus* and *field*. The habitus includes the durable and transferable systems of perception, evaluation, and action schemes in bodies. The fields demarcate the systems of objective relations and the practices emerging from this relationship (ibid.). Within the social topography of the fields, individual practices represent the mundane symbolic dimension of culture. Culture is the repertoire of action being applied as *symbolic capital* in the ongoing struggle for social positions and status.⁶⁷ Owing to the respective social classifications and evaluations being ascribed to the cultural practices, these individual practices are an immediate expression of *social inequality*. The individual condition of life is defined by the availability of *economic, cultural, and symbolic capital*. Lifestyles (*Lebensstile*), understood as the socio-cultural repertoire of action, and conditions of life (*Lebenslagen*) are thus interconnected and mutually dependent, both bound together by the concept of habitus in which the condition of life determines the lifestyle.⁶⁸ Similar to Marx's approach, in Bourdieu's thinking, social inequality as the dominant form of differentiation is also the result of a kind of societal basic structure. Bourdieu, however, in his earlier texts, does not aim to reconcile the differences. Instead, he draws a picture of a stable, balanced inequality.⁶⁹ Against this backdrop, he could perhaps also be interpreted as an example for the third discourse. However, in his later texts after 1990, he began to explore the role of the state as a mediator or regulator of the encompassing inequality and injustice. He also attempted to reflect the role

65 HILLEBRANDT (2001) 61–67.

66 BOURDIEU/WACQUANT (1996) 160, my translation.

67 HILLEBRANDT (2001) 63.

68 BOURDIEU (1987) 281.

69 HILLEBRANDT (2001) 66.

of civil society in this respect.⁷⁰ Moreover, he thought of “reflexive sociology” as an instrument by means of which the intellectual milieu could resist the overarching power of capitalist (neo-liberal) domination,⁷¹ which puts him, finally, within the position of the second discourse, pursuing a final identity behind the differentiation of lifestyles and conditions of life.

While Bourdieu has certainly provided general sociological theory with a modern and complex concept of societal differentiation, which has garnered major influence in German sociology over the last decades,⁷² he has left only faint traces with respect to the law. Pierre Guibentif⁷³ lists nine passages concerning the law in Bourdieu’s complete work, three of which address the law and / or the judiciary directly, the others dealing primarily with economics. One could, therefore, attest to a complete absence of the law from Bourdieu’s theory. Over this past decade, however, there has been an increasing interest in Bourdieu’s theory in socio-legal scholarly circles. Studies in constitutional sociology and the comparative analysis of legal cultures⁷⁴ as well as on the regulation of labour migration and homecare⁷⁵ can serve as examples. They are not primarily concerned with questions of differentiation, inequality, or the diversity of lifestyles, but rather profit from Bourdieu’s approach to cultural sociology in connection with the habitus-field theory.⁷⁶

Jürgen Habermas, like Bourdieu, takes strong interest in social inequalities, but, in contrast to the latter, with a pre-eminent role for the law, coming from a different starting point, which is more closely linked to Marx than Bourdieu’s theory. At the beginning of the 20th century, the social sciences had found themselves caught up in strong tensions between Marxist ideas and the neo-Kantianist position connected with the name of Max Weber. During the twenties and thirties, a number of scholars in the Marxist tradition, for instance, in early critical theory, attempted to counter the Weberian challenge by developing a sociological theory that encircled normative positions on the basis of empirical evidence. The political situation of

70 BOURDIEU (1993).

71 BOURDIEU / WACQUANT (1996) 231.

72 MÜLLER (1997); RECKWITZ (2003); NASSEHI (2004); HILLEBRANDT (2014).

73 GUIBENTIF (2010) 273, cf. BOURDIEU 1986.

74 WITTE / BUCHOLC (2017); GEPHART (1990).

75 KRETSCHMANN (2016).

76 Cf. KRETSCHMANN (2019) for an overview.

the time, however, confronted them with the empirical collapse of the Marxist idea of class consciousness that could not be upheld under the experiences of the late Weimar Republic and the Nazi regime.⁷⁷ Under these conditions, early critical theory lost ground and became, namely in Adorno's later writings, more an aesthetical and subjective critique of society.

In the 1960s and 1970s Habermas began to re-establish critical theory by arguing that the universal and "original" mode of social order, the integration of society, is normative – namely of moral quality – in its nucleus. During the 'linguistic turn', he developed together with Karl Otto Apel a procedural approach to a theory of justice under the name "discourse ethics". One problem of the philosophical version of this theory is its "decisionistic remainder", as Habermas⁷⁸ called it. The term indicates that a procedural theory can only provide for procedural principles, which may lead to justifications, but cannot provide for reasons to take part in procedures. This decision is beyond the range of "transcendental pragmatism" (*Transzendentalpragmatik*) of discourse theory, as Apel named his version. Habermas, therefore, stated in his "universal pragmatism" (*Universalpragmatik*) that the "original mode" of social integration empirically entails exactly those principles, which are constitutive for discourse ethics. If this were the case, the refusal to take part in discursive justification of norms would come to a performative contradiction: denial of the universal fundament of speech *and* socialisation by withdrawing from social life itself – an act that could not be carried out within a social context. This argument, which can be characterized as a type of social reductionism, requires a respective sociological theory to bridge the Weberian divide between facts and norms. It must prove for social integration's being empirically a moral phenomenon.

Ever since the Theory of Communicative Action (1981), Habermas has been trying to develop such a sociological theory on the basis of linguistic speech act theory. During the eighties, his thinking was still very much influenced by Hegelian-Marxist ideas of universal history and by a strong anti-institutionalist emphasis. Later, mainly under the influence of Bernhard Peters (1993) and Klaus Günther (1988), he tries to demonstrate the inherent rationality in the fundamentals of social integration and their connections to

77 Not by chance, at the same time, the, sociology of knowledge (MANNHEIM 1924/25) in a significant upturn replaced the Marxist *Ideologiekritik*.

78 HABERMAS (1983) 96–109.

constitutional institutions of modern society. In his book “Between Facts and Norms” (1992), the differentiation between “Life-World” (*Lebenswelt*) and “System”, which had already been constitutive for his earlier approach, gets an institutionalist interpretation. Still, life-world is the realm of rationality, the part of the world in which communicative action in its full sense can take place. Normative reasons can be found in this area. Life-world is the horizon and resource for every kind of normative claim that can be made in a communication. Habermas tries to show, that a specific type of interaction, called communicative action, is unavoidably and indissolubly linked to social life in the area of the life-world. Society, in its original mode, in other words, is characterized by (moral) identity, differentiation being a secondary and basically pathological phenomenon. The normative rationality of communicative action generates the morals that may be used in procedural ethics to examine normative validity claims.

There arises, however the question of how to relate the sphere of rationality to all other spheres of society, which are obviously not governed by all-encompassing normative rationality, the world of the social ‘systems’, as Habermas understands it. A central role in this theory of *differentiation* falls in particular to the *law*. Since the law forms a link between the life-world and the system, it provides the ‘systemic’ area with a certain facility to resonate with the rationality of the life-world. Through certain gateways – namely procedures of citizen participation in public decision making – the morals from the periphery of the life-world are smuggled into the centre of the legal-political system.⁷⁹ The public can indirectly ‘regulate’ the administrative complex of the legal-political system, namely through attempts to influence its self-regulation by moral arguments. In participatory procedures, it contributes to the *integration* of society. Integration, according to Habermas, stems from both democratic public and legally institutionalized decision making procedures and from the transport of the results of these procedures into the realm of administrative and political power by means of the law. Deliberative public in legal procedures serve as ‘sluices’ through which life-world-based rationality from the societal peripheries pours into the cen-

79 The centre-periphery distinction has also influenced SCIULLI (2010) and TEUBNER (2012). The development of Habermas’s theory is more complex with respect to the law. I do not discuss the rather puzzling distinction between law as a medium and an institution here; cf. HABERMAS (1981); BORA (1991).

tral circles of political and administrative power.⁸⁰ The promise of critical theory of society, in other words, is to bridge the gap between facts and norms and thereby to provide for an empirical foundation for normative reasoning. The advanced form of this theoretical undertaking can be found in Habermas's construction of the life-world and system, with the law as an institutional "sluice"⁸¹ between the two spheres. Life-world's interaction with its moral rationality is the "original mode" of socialisation.⁸² The law transfers the rationality of the peripheral life-world to the institutional (legal-political) 'centre' of society.⁸³ It thereby brings into being the normative integration of society as a whole.

The general idea in the theories of social differentiation in the second discourse, in summary, is the reconciliation of social differences and inequalities as the ultimate goal for theory (and societal practice). The role of the law in Marx's and Bourdieu's theories remains rather marginal. In contrast, Habermas attributes a central role to the law. In the theory of communicative action (1981), the law performed as a rather ambiguous, twofold phenomenon: as a medium of systemic integration, on the one hand, it is seen as an aspect of the colonisation of the life-world by the functional systems, and then as an institution, on the other hand, which, being a display of communicative rationality embedded in the life-world, represents the original mode of social integration. Such an idiosyncratic construct did not generate lasting resonance in sociological theory, this owing to its eclectic use of both sociological theory and empirical facts. Later, in "Between Facts and Norms" (1992), Habermas took a much more benevolent position with respect to the law. It was now addressed as the core instrument of legitimate power, of democratic decision making, and as the ultimate defence against an excessive flow of power from the centre of society toward the peripheral domains. Participatory procedures in legal decision-making procedures, as Habermas was deeply convinced, are the sluices, through which the communicative rationality of the life-world should penetrate from the societal peripheries to the centres of power and influence.

80 HABERMAS (1992) 187, 426, 428, 533, *passim*; HABERMAS (1996) 370.

81 PETERS (1993).

82 PETERS (1993) 230.

83 PETERS (1993) 327; HABERMAS (1992) 187.

The resonance of this discourse in the sociology of law was manifold. In the 1960s, Marxist theories rather prominently and widely acted as a general reference point, a kind of sociological common sense, often more as an aspect of a critical *Zeitgeist* than a systematic theoretical approach. American critical legal studies had later gained some relevance internationally but did not have a strong influence on the German debate.⁸⁴ Even so, some neo-Marxist approaches⁸⁵ connected with the names of Franz Neumann, Otto Kirchheimer, Nicos Poulantzas, and Andrea Maihofer, for instance, have been present in the socio-legal debates of the last decades. They criticized economic determinism⁸⁶ or traces still extant of class justice (*Klassenjustiz*) in post-war society.⁸⁷ These approaches, however, remained almost completely isolated from the broad sociological tradition of inequality research – unequal distribution of resources such as income, property, education, health, employment opportunities, etc.⁸⁸ – which, until this present time, has no explicit relation to sociological theories of law.

Habermas's position, on the other hand, generated widespread resonance in the social sciences and in the sociology of law⁸⁹ during the 1980s and 1990s, but has also raised a number of critical comments in the field of general sociology.⁹⁰ Later sociological studies dealing with the concept of deliberative public and the law have given cause to question both the empirical grounding and the theoretical position of Habermas's works,⁹¹ mainly by indicating that Habermas's presuppositions about the constitution of social order may be somewhat fragile and may lead to debatable results compared with theories preferring the aspect of social order to that of rationality.

84 FRANKENBERG (2006).

85 BUCKEL (2006).

86 MAIHOFFER (1992).

87 The interest in class justice subsequently gave way to more sophisticated concepts of professionalisation (cf. BORA 2001), which became prominent in general sociology but did not generate a lasting resonance in the sociology of law.

88 HRADIL (2001); BURZAN (2007); DAHRENDORF (1966); SCHWINN (2007).

89 EDER (1986, 1987); LADEUR (1986); SCHMIDT (1993).

90 THOMPSON/HELD (1982); THOMPSON (1983); WEISS (1983); ALEXANDER (1985); HONNETH/JOAS (1986); EDER (1988); LUHMANN (1993a); KNEER (1996); SAND (2008).

91 BORA (1991, 1994, 1999); HAUSENDORF/BORA (2006); BORA/HAUSENDORF (2010).

2.3 Alterity

In contrast to the first two, the third discourse introduces social order as basically grounded on difference. It represents sociology in a normative perspective combined with a model of social order as difference. *Alterity/otherness* and *diversity* may serve as keywords characterizing the third discourse.

This perspective has been taken by a number of philosophical and anthropological approaches, followed by some sociological theories, among which contemporary gender and diversity approaches are a rather recent and prominent development.

In philosophy and anthropology, the notion of *otherness* or *alterity* has become prominent in the tradition of Hegel, Husserl, Adorno, Lacan, and Derrida. The term indicates a specifically new concept of identity separate from the notion of the prevalence of identity over difference. Otherness/alterity means that identity is being constructed by difference, by the distinction or demarcation between entities.⁹² Difference, in this respect is the leading term in these concepts. *Otherness* emerges through distancing oneself from a presumed other easily defined by faults, mistakes, deficits of whatever kind. The ability to construct an entity's identity by the mechanism of *othering* depends on social power and, vice versa, creates the position to dominate others. In political philosophy, Castoriadis⁹³ spoke of radical alterity as an element of social creativity and novelty. In a similar way, Baudrillard⁹⁴ understood alterity as a valuable element of modern life.

In sociological theory, Zygmunt Bauman,⁹⁵ referring to Simmel's figure of the stranger, emphasized that Identities are constituted by differences. The ambivalence consists of the fact that the other constitutes identity on the one hand and, on the other, is symbolic of the dangerous and threatening that is excluded in xenophobia and antisemitism. In the sociology of knowledge, Foucault⁹⁶ identified the other as the figure symbolizing non-rationality (madness, deviance), thereby triggering a process of exclusion with the

92 WARF (2006) 345.

93 CASTORIADIS (1975).

94 BAUDRILLARD (1987); BAUDRILLARD/GUILLAUME (2008).

95 BAUMAN (1991).

96 FOUCAULT (1969).

means of imaginary representations – “knowledge of the Other” – in service to power and domination. Neither Bauman nor Foucault, however, was primarily interested in a theory of social differentiation. Bauman addressed the fundamental ambivalence of both social structure and semantics. Foucault was either preoccupied with the discursive construction of social order,⁹⁷ or with the genealogy of power and the archaeology of knowledge,⁹⁸ both lying beyond questions of social differentiation.⁹⁹ For lack of a distinct theory of societal differentiation, these approaches of alterity maintain a rather distant position with respect to sociological theory, similar to Adorno’s position in “Negative Dialektik”,¹⁰⁰ where he emphasized a sharp dissociation of the individual against societal overpowering.

A more explicit reference to the philosophical and anthropological roots of otherness/alterity can be found in contemporary feminist sociology. Alterity, as has been indicated above, in many respects is related to differences in race, gender, and ethnicity. Feminist sociology and gender theories relating to general sociology as well as to the sociology of law in their normative, critical appearance attach directly to the discourse of alterity. A prominent voice in this respect has been that of Simone de Beauvoir, who, in the introduction to “The second Sex”,¹⁰¹ presented the category of the other as a primordial social fact, a social construct being ubiquitous through space and time. For Beauvoir, otherness is a fundamental category of human thought. Judith Butler¹⁰² draws on this position with her gender approach in sociology. From a post-structuralist perspective, Donna Haraway combines gender theories with science and technology studies, claiming the importance of situated knowledge¹⁰³ and of “otherness, difference, and specificity”.¹⁰⁴

Legal theory, against such a background, broadly engages in discussions of gender inequalities under topics such as “feminist legal theory”, “feminist jurisprudence”, “legal gender studies”, “gender law”, and the like.¹⁰⁵ Differentia-

97 FOUCAULT (1977).

98 FOUCAULT (1973).

99 BORA (1999) 168–172.

100 ADORNO (1966).

101 BEAUVOIR (1968).

102 BUTLER (1990).

103 HARAWAY (1988).

104 HARAWAY (2003).

105 BERGER/PURTH (2017); BÜCHLER/COTTIER (2012); ELSUNI (2006); BAER (2011) 146–152.

tions between radical, liberal and other trends in feminist studies will not be discussed here in further detail. Generally speaking, feminist legal thinking was, in the beginning, concerned with inequity in the sense of the second discourse, aiming to overcome male domination. Gender quotas, affirmative action, constitutional rights, and specific protection for women were the central topics.¹⁰⁶ After these approaches had been exposed to a fundamental critique as being ‘essentialist’ difference-theoretical concepts, they came to the foreground,¹⁰⁷ for instance as analytics of power.¹⁰⁸ Postmodern feminist legal theory,¹⁰⁹ drawing on Butler, finally analyses social order as a construct, pointing to a reality beyond the binary concept of gender,¹¹⁰ and at gender, race, and intersectionality,¹¹¹ explicitly related to the difference-theoretical concept of alterity.¹¹²

Intersectionality leads directly to the concept of *diversity*. Like the aforementioned approaches in this discourse, the semantics of diversity has not to date led to a comprehensive sociological theory. It has, rather, to be understood as an expression of political attitudes, delivering a diffuse notion of mostly cultural distinctions. Bourdieu, in his earlier writings on habitus-field theory, had, as previously discussed, already described the diversity and variety of life styles and life conditions. Diversity is, in this respect, often thematised as cultural diversity.¹¹³

The term ‘culture’, on the one hand, is not without problems in sociological theory. Baecker¹¹⁴ describes culture as a second-order semantics, which – in contrast to politics, economy, or the law – provides society with alternatives to itself. In comparing ‘cultural’ differences, society can identify other forms of order and ways to overcome existing circumstances. Baecker also demonstrates the vagueness of the concept as a *tertium comparationis*, which does not yet have a precise definition despite all attempts to formulate

106 BERGER/PURTH (2017) 1.

107 ELSUNI (2006) 166–168; TÖNNIES (1993) 142.

108 MACKINNON (1989).

109 MAIHOFFER (1995).

110 PLETT (2007).

111 CRENSHAW (1993).

112 KAPUR (2018).

113 DUVE (2013).

114 BAECKER (2000).

a cultural theory of society.¹¹⁵ Instead, it serves as an indicator of the surprised awareness of differences, the astonishment at unfamiliar practices elsewhere, i. e. in a different culture.

Diversity, on the other hand, is no more a precise term than culture. It is being used as having a broad variety of meanings and contexts, namely with reference to cultural and racial backgrounds, ethnicity, gender, sexual orientation, age, religion, and physical or mental handicaps. In all these dimensions, different degrees of social inclusion can be observed, raising questions about equality along the boundaries created by diversity. It appears, in the main, to be a fuzzy term, with both normative and empirical connotations.¹¹⁶ The origins of the semantics can be found in grass-roots movements of the 1960s, incorporating women's and civil rights movements, struggling for affirmative and easier access to education, work, and life chances. The term is widely used in a great variety of policy fields. No sociological theory, however, is explicitly related to the term 'diversity'. Diversity can become the subject of alterity-theories, as the example of intersectionality demonstrates. Against the background of social inequalities, it can in turn be related to legal questions.¹¹⁷

The discourse of alterity is a broad and practically influential discourse, closely connected with social struggles, but less resounding in sociological theory. Aspects of intersectionality and diversity point to secondary social distinctions beyond functional differentiation. In this way, they require a comprehensive social theory, providing for elaborate concepts of communication or action, of social structures, and of historical/social evolution, etc. In these respects, many of the approaches mentioned in this paragraph, implicitly or explicitly, refer to (neo-)Marxist concepts, with all their inherent theoretical problems. They do, however, not yet provide an elaborate sociological theory of alterity as a concept of social differentiation.

Moreover, the third discourse demonstrates that the combination of difference theory and the normative approach causes a certain amount of friction. In lack of conceptual bracing like the immanent evolutionary teleology in the second discourse, it is difficult for the approaches in the third discourse to emancipate themselves from the position of a political attitude and to

115 RECKWITZ (2000).

116 DUVE (2013).

117 DUVE (2013).

develop a coherent and comprehensive sociological theory. Bauman and Foucault, although both of them were important and influential sociological thinkers, did not provide for such a theory. Feminist approaches, despite their undeniable political and practical relevance, remain in the same position with regard to sociological theory, namely as a sociology 'engagé'.¹¹⁸

2.4 Differentiation

The fourth discourse represents sociological theory as empirical science combined with a model of social order as difference. It becomes manifest chiefly in sociological systems theory, the most famous and influential part of which is Niklas Luhmann's work. It is not possible here to report the history and the architecture of this theory in detail. Though the readers will be acquainted with the main features,¹¹⁹ it might nevertheless be appropriate to refer to the core aspects of Luhmann's theory. Its focus, in contrast to the aforementioned approaches, is on social differentiation. The question of social order is addressed via the instrument of the basic distinction between system and environment, leading to a sociological systems theory that focuses on autopoietic, self-constructing, self-regulating, and self-limiting systems, their basic elements consisting of communications, and their structures being communicated expectations.

Luhmann's work consists of a general and comprehensive theory of society. This theory contributes to the study of micro- as well as of macro-systems. It holds general relevance for all social systems because it is based on communication as the basic element that is structured equally in all kinds of social systems. Luhmann draws on Parsons's work with all its theoretical ambitions and systematic achievements, but without copying the hierarchic and norm-oriented architecture of Parsons's theory. Instead, Luhmann's sociological systems theory is characterized by a non-hierarchic model of autonomous – autopoietic – social systems that are not bound together by normative structures, but rather operate simultaneously according to their respective individual logic. The basic distinction – also giving reason to call the theory difference-oriented – is the distinction between system and envi-

118 The sociologist as a social engineer engagé can also be identified in other branches of the sociology of law, cf. BORA (2018).

119 LUHMANN (1984, 1997).

ronment. A system emerges wherever communications connect with each other by distinguishing themselves from an environment, irrespective of the question of which sort of elements can be found in the environment. This kind of distinction creates the autonomous operation of the system, its reproduction, and its demarcation, the three aspects being condensed by the term 'autopoiesis'. Luhmann, as is well known, distinguishes three types of social systems, namely interactions, organisations, and societal systems.

The differentiation of society is in Luhmann's work conceived of as *functional differentiation*. In contrast to other sociological theories, systems theory does not treat the question of social order as an issue of integration. It does not ask which elements society would be composed of, but rather it starts by asking which differences society would make use of in constituting itself. The form of societal differentiation is therefore the key to understanding particular manifestations of social order. From a historical point of view, Luhmann, in the main, distinguishes three forms, namely segmentary, stratified, and functionally differentiated societies. The latter is characterized by the formation of global systems of communication, each of which is ruled by a guiding code, such as truth, power, money, or law, for example. These functional systems use their binary codes so as to create order, i. e. differentiated order. They operate society-wide (universally) and they are each responsible for a (specific) function.

Differentiation being the central aspect of the theory, societal integration has to be understood as a subordinate concern. Functional systems create order as an order of inclusion. Inclusion, in contrast to integration, means a relationship between social systems and individuals, a specific form of observing humans in communications, namely by treating them as 'persons' and making them addressable in this way.¹²⁰ Integration, by contrast, describes the relationship between different social systems (for the following, cf. BORA 1999, 58–71). It requires only the co-evolution of structurally linked subsystems. They provide each other with output (*Leistung*). The integration of society does not rest upon a superordinate unity of society, but only on the autonomous operations of a whole variety of functional subsystems and their mutual observations. This concept does not provide a criterion for 'successful' integration, nor for any kind of preferential evolutionary devel-

120 See BORA (2016a) about responsivity as ultimate addressability.

opment. Luhmann's theory is therefore strictly non-normative in its core. Concepts such as inequality occur as secondary phenomena, based on the basic mechanisms of inclusion and exclusion. They can be observed as a societal semantics reflecting justice as a principle, reducing complexity in the system of law.¹²¹

Against this background, Niklas Luhmann's oeuvre is characterized by a long list of publications in the field of *sociology of law*. They range from – to mention only some milestones – legal theory in *Grundrechte als Institution* (1965), a general theory of procedure in *Legitimation durch Verfahren* (1969), theory of norms, and positivisation of law in *Rechtssoziologie* (1972), a critique of legal consequentialism in *Rechtssystem und Rechtsdogmatik* (1974), and systems theory of the law in *Das Recht der Gesellschaft* (1993) to the theory of form in *Die Rückgabe des zwölften Kamels* (2000). Apart from these volumes just mentioned, there is also an overwhelmingly large number of journal articles belongs to the broad variety of publications on the sociology of law, a small collection of which can be found in *Ausdifferenzierung des Rechts* (1981).

In this very rich literature, the *leitmotifs* and central thematic issues of Luhmann's socio-legal work can be summarized in at least five complexes:

(1) Firstly, Luhmann has always been concerned with *law as a functional subsystem of society*. Long before the autopoietic turn, this interest took the form of the theory of norms, which was later expanded and complemented by a general theory of society. The transition between these two phases is clearly marked by the last chapter, which was added to the second edition of "*Rechtssoziologie*" in 1983. The sociological theory of the law has always been widely characterized by the role of positive law in functionally differentiated society. Oriented toward the classical problems of the sociology of law (*Rechtssoziologie*), it has been marked out by the theory of evolution, in contrast to a more systems theoretical orientation since the 1980s.¹²² The theory of norms is the basis on which the law can be conceived of as a structure of society. Positive law and conditional programming are in the nucleus of the argumentation; they emerge as forms in functionally differentiated modernity. Finally, the book addresses the interrelation between law

121 LUHMANN (2013) ch. X, 245–249.

122 GUIBENTIF (2000) 230.

and social change, namely by a very categorical controversy with steering theories.

(2) Secondly, in many debates involving various aspects of jurisprudence and legal theory, from the early stages onward, Luhmann dealt with *theory of justice* from a sociological point of view, i. e. with the function of the semantics of justice. Gunther Teubner¹²³ picked up on this theme in a more normative way some years ago.

(3) Thirdly, Luhmann engaged critically in the debate over *legal consequentialism*. The orientation by consequences, he argued, interferes with the temporal structure of the law, which lies in stabilisation of expectations rather than in their adaptation.

(4) A fourth leitmotif is finally constituted by the question of *paradoxes* in the law and the structuring processes resulting from the law's reaction to paradoxes. This issue emerges relatively late in connection with form theory, although the basic idea had already been established much earlier, for example in Luhmann's contributions to legal theory and dogmatics.

(5) *Das Recht der Gesellschaft* (1993), finally, presents an additional aspect, namely a fundamental reference to the sociology of science. In the introduction, the argumentation refers to the implications of an imagined interdisciplinary dialogue between sociology and jurisprudence. The former as empirical science and the latter as normative science encounter each other primarily in a rather speechless way. However, they share a common interest in the scientific definition of their object. Today, as Luhmann argues, this question can only be formulated meaningfully as the search for the boundaries of the law.¹²⁴ If and insofar as they two sides could agree upon the observation by which the object itself – which is: the law itself – defines its boundaries, social systems theory would provide a conceptual framework for the dialogue because it is designed to theorize internal and external perspectives of self-describing systems and thereby provide an appropriate perspective (*“sachangemessene” Perspektive*).¹²⁵ The achievement of this perspective, as Luhmann argued, can be seen in the linkage between legal theory and theory of society, in other words, in a sociological reflection of the law (*“in einer gesellschaftstheoretischen Reflexion des Rechts”*).¹²⁶ This reflection is strictly

123 TEUBNER (2008).

124 LUHMANN (1993) 15.

125 LUHMANN (1993) 17.

126 LUHMANN (1993) 24.

and categorically non-normative.¹²⁷ It presupposes that the differentiation between norms and facts is an internal differentiation of the law, for which reason it cannot be applied by the reflective theory, i. e. the sociology of law.

In his posthumous book *Kontingenz und Recht*,¹²⁸ Luhmann presented the theoretical complement to the *Rechtssoziologie* from the standpoint of a sociological theory of legal thinking. What is of primary importance in this text for today's discussion is an aspect of the sociology of science, the epistemological approach in the broader sense, which demonstrates the potential of the theoretical concept and some missed opportunities in systems theory at the same time. Legal theory in this text is conceived of as intermediation between sociology on the one hand and theories of judicial decision making on the other. The general idea is to ascribe problems in decision making to systemic problems.

Being, however, complex and comprehensive, this theory comes to an epistemological shortcoming when addressing the performative limits of law vis-à-vis excessive societal complexity.¹²⁹ In cases of societal over-complexity, Luhmann argues, one can observe, a significant disengagement of legal theory with respect to questions of justice on the one hand and a tendency to externalize reflection to political planning. This interpretation is very illuminating as regards Luhmann's epistemological position. He appears to speak about the externalisation of problems to the environment in legal theory. However, if we take a closer look at legal theory, this might seem somewhat doubtful. Legal theory is strongly engaged in questions of social justice, of normativity in the subject area itself, and it takes part in debates on norm building, legislation, and legal policy – in other words, in all the issues which, according to Luhmann, are externalized to political planning. In this way, the empirical situation appears to contradict Luhmann's description to a certain degree.

This would perhaps be only a minor point if it did not have consequences for our epistemological question. If one asks, why Luhmann's argument takes such a quite surprising turn, an explanation for his framing of the issue could perhaps be found in the assumption that he hypostatizes his

127 LUHMANN (1993) 31.

128 LUHMANN (2013), originally written in 1973.

129 LUHMANN (2013) 263.

own epistemological model to legal theory.¹³⁰ If true, this would mean that he is talking more about his own legal theory than about contemporary trends in the discipline. Moreover, his underlying sociology of science, one could presume in addition, shapes his sociological theory of law, what with the sociology of science characterized by an asymmetric relationship between sociological observation and the reflective theories of the subject area. Accordingly, we find an asymmetric model in Luhmann's sociology of law, rather reluctant to adopt the problems of the environment – i. e. in the reflective theories of law – as problems relevant to sociological theory.

To summarize this point, one could say that one problem with Luhmann's sociology of law consists of the conceptual strategy of his sociology of science. The theory takes only the position of the scientific observation, which here, specifically, is the sociological observation, in contrast to the observation of the object, in other words, the law, or legal theory. Such a sociology of science could be called asymmetric in the sense that it presupposes a certain epistemological incline or gradient between sociological theory and the self-description of the object.¹³¹

Luhmann's sociology of law has received widespread attention and has been discussed intensively in both sociology and jurisprudence. It has sometimes provoked irritated reactions, often related to conceptual misinterpretations, one of which being the hypostatisation of society, to mention just one example. A general focus on societal subsystems – which was not grounded in the systematic of the theory, nor had it been Luhmann's intention – often led to an over-generalisation of functional subsystems by less-informed readers. They took societal subsystems as the only message, even in

130 One might counter this argument with reference to the historical context of *Kontingenz und Recht*, claiming that legal theory – at least in jurisprudence – over many decades had been rather positivistic and abstinent from questions of justice, which had been delegated to practical philosophy. To this extent, one could argue, Luhmann had referred to the contemporary situation in 1973. I should, however, point to the prominent role that *Radbruch's Formula* played in German jurisprudence and legal practice after 1945, one of critical legal thinking, of deliberative approaches in theories of state and democracy in constitutional jurisdiction, to mention but a very few aspects. These examples serve to indicate, how strongly legal thinking has always been concerned with questions of justice. Luhmann's diagnosis of disengagement would therefore, appear to be much more due to his epistemological presuppositions than to the empirical situation in legal theory, even in historical respects.

131 BORA (2016b).

cases where Luhmann was clearly dealing with interaction systems or organisations. His article on communication about law in interactions¹³² was seemingly barely received. In a comparative mode, this also holds true for the over-stylisation of the term ‘autopoiesis’ in many readings, a perspective clearly criticized by Luhmann himself in an interview with Pierre Guibentif.¹³³

Apart from these obvious problems with the reception of a comprehensive and complex theory, the situation has improved since some of Luhmann’s works have been published in English. Moreover, a great number of scholars have adopted and developed the theory, among whom Gunther Teubner, Michael King, Christopher Thornhill, and Poul F. Kjaer may be named as prominent examples, along with the extraordinarily broad and fruitful adoption in Italian, French, Spanish, and in Latin-American academic circles connected with authors such as Marcelo Neves, Aldo Mascareño, Alberto Febbrajo, and Pierre Guibentif.

In the German-speaking world theorists of law such as Per Zumbansen, Marc Amstutz, Karl-Heinz Ladeur, Lars Vellechner, and Fay Kastner contributed to the sociological theory of law and of justice, taking inspiration from a systems-theoretical perspective. Beyond that, a number of empirical studies have been published in recent years, characterized by a rather strong theoretical orientation, which, in part, make use of Luhmann’s sociology of law, to some extents trying to develop it further.¹³⁴ Moreover, the issue of steering and shaping society that had been dismissed in Luhmann’s work has garnered broader attention.¹³⁵ Already in 1984, in a famous article on reflexive law, Gunther Teubner and Helmut Willke¹³⁶ had identified various mechanisms of regulation, such as reflection (observation of the system-environment difference and of the effects of the system’s operations), and context regulation (indirect steering). While, in this early article, the political system was in a certain way still regarded as the centre of society, in their later writings, both authors turned more strictly to the autopoietic concept.

132 LUHMANN (1981) 53–72.

133 GUIBENTIF (2000) 233.

134 BORA (1999); BORA/HAUSENDORF (2010); MÖLDERS (2011); MÖLDERS/SCHRAPE (2017); HECK (2016); KASTNER (2016); HILLER (2005); BONACKER (2003); BRODOCZ (2003).

135 BORA (2017).

136 TEUBNER/WILKE (1984).

Gunther Teubner broadly published about autopoietic law and about legal pluralism, referring to social practices as the source of positive law.¹³⁷ In this regard, he is a successor to Eugen Ehrlich, drawing deeply on the distinction between positive law and ‘living’ law. His version of sociological jurisprudence can, to a large extent, be understood against this background. In contrast to Ehrlich (and Geiger as well), Teubner focuses on societal differentiation as a core element of a sociological theory of law. In his works on sociological constitutionalism, the differentiation of societal regimes is the empirical basis for the identification of “constitutional fragments”. What makes his theory part of the discourse of differentiation is, essentially, his concept of reflection, which is closely linked with that of integration. Instead of putting integration at the centre of interest, as Parsons, for instance, did, Teubner searches out different aspects of *limitation* in the relationship between functional systems. Constitutional fragments are interpreted from this perspective as means of societal limitation of the affluent self-enforcement of functional systems. A second achievement of Teubner’s systems theory of the law consists of his attitude toward practice, which signifies a step beyond the epistemological shortcoming of systems theory, of its reluctance to deal with the role of the environment, to engage, in other words, in practical questions. Teubner deals with questions stemming from legal theory and triggering theoretical and conceptual innovations in sociological theory. As an example, his analysis of legal technologies in a complex and responsive interplay of sociological theory and legal dogmatic reflections may be mentioned.¹³⁸

Summarizing this section, one can say that, on the whole, Luhmann’s sociology of law has achieved the status of a broadly acknowledged, far-reaching and comprehensive sociological theory of law. It provides an approach to a sociologically informed legal theory, a sociological description of the internal mechanisms of the law, and also a sociological description of reflective theories in law (legal theories).

On the other hand, as I have attempted to indicate, it remained deficient in a certain sense with respect to its epistemological stance *vis-à-vis* the social environment of the theory – in other words, the practice. It is not an attempt to orient sociological theory toward legal problems, i. e. questions that arise

137 TEUBNER (1988, 1992, 1996, 1997, 1997a).

138 TEUBNER (2006, 2018).

in the environment of sociological theory. Although there are some points in the theory, where practical issues seem to be suited to trigger theoretical reflection in sociology, it, nevertheless, does not follow that path. Luhmann's work does not, after all, provide an epistemological model able to overcome the asymmetry in the sociology of science, as I have attempted to outline. It therefore offers less of a legally informed sociological theory or a reflective theory of law (legal theory) than a sociological observation of legal reflection.

At the same time, however, many systems theorists are trying to develop the theory further, only to mention the so-called critical systems theory,¹³⁹ trans-constitutionalism,¹⁴⁰ peripheral or semi-peripheral modernity,¹⁴¹ societal constitutionalism¹⁴² as a few examples. This rather broad movement also demonstrates a certain, perhaps widespread dissatisfaction with the theoretical status reached within Luhmann's work itself. Remarkably enough, this development has gone hand in hand with a significant institutional decline of the sociology of law in some countries over the last decades.¹⁴³ I shall not be further concerned with this institutional aspect. I should like instead to focus on the performance of systems theory with respect to law and diversity in the following section.

3 Law and diversity

The idea of 'diversity' points to a rather new topic in socio-legal discourse, as has already been mentioned above. Terminologically underdetermined, broader than differentiation or inequality, and simultaneously more specific, often focusing on a cultural dimension, the concept of diversity proves to be hardly comparable to any sociological theory as an analytical tool. It seems, rather, to belong in the political realm. Stemming from biology, the term originally means a multiplicity of biological species (biodiversity). Already in this context it bears a normative connotation. Diversity, as is implicitly insinuated, is preferable to homogeneity. The normative component

139 AMSTUTZ (2013); MÖLLER/SIRI (2016).

140 NEVES (2013).

141 GUIBENTIF (2014).

142 TEUBNER (2012); THORNHILL (2011, 2018); FEBBRAJO/CORSI (2016); CARVALHO (2016); HOLMES (2013).

143 BORA (2016b).

becomes more visible in the transferred figurative sense, standing for cultural heterogeneity. UNESCO, for instance, uses the term in this sense in connection with anti-discriminatory politics. In such contexts, diversity typically represents a demanding position, claiming normative inclusion. When looking from a sociological perspective for a causal relation between a possible inflation of the semantics of diversity on the one hand and functional differentiation on the other, one would perhaps think of the stellar career of concepts of subjectivity and subjective rights and their linkage with cultural diversification and societal differentiation.

These first impressions lead toward sociologically instructive problem formulations, if one disengages from the mundane use of the semantics in societal practice. The distant observation can help in treating the terminology not as an analytical category, but rather as cultivated semantics, a schematisation used by the communications in society, i. e. in the subject area of the sociological analysis. Against this backdrop, diversity as social semantics also represents, among other aspects, normative expectations, i.e. contractually stable expectations that can be attached to manifold and heterogeneous phenomena with the label of diversity. In this way, it is not diversity as a mere heterogeneity being a challenge for the law, but rather, in fact, the legally relevant normative heterogeneity, the multiplicity of normative claims, or, as Thomas Duve has called it, the *multi-normativity* of the world addressed by the law in its operation.¹⁴⁴

From a sociological perspective, two constellations of the law as dealing with multi-normativity can be distinguished: The first is the legal regulation of multiple normative phenomena standing for the routine operation of the law. The law decides cases, among which some with divergent normative claims can be found and subsumed under the general legal jurisdiction. In these instances, the law does not face systematic problems or particular challenges.

The second constellation, in contrast, can be characterized as a special challenge, insofar as it concerns competing normative systems and validity claims. One may, for instance, think of indigenous groups in Brazil applying the norm of infanticide in the case of twin births.¹⁴⁵ They are obviously following a compulsory norm in their community, be it a legal or a proto-

144 DUVE (2017).

145 NEVES (2013) 139 ff.

legal one. The positive law cannot simply regulate such cases in the mode of the aforementioned first constellation by deciding them according to the respective criminal codes because the question of the validity of the indigenous norms suggests itself. These norms claim to be relevant to the decision in the realm of positive law, and legal theory tends to acknowledge such claims.¹⁴⁶ In such cases, diversity does not simply mean cultural heterogeneity. It is instead an expression of political desire and normative aspiration. It represents a normative semantics transporting postulates of inclusion. The environment, the ‘other’, demands internal legal addressability. Diversity and distinctiveness are marked with normative coding. The legal observation of normative postulates in the context of social diversity triggers internal legal reflection. It drifts into a situation of normative validity competition, in which it addresses normative expectations in its environment that strongly compete against positive legal structures.

In this second constellation, we identify a form of normative re-entry. The distinction between law and non-law, between normatively expectable and unexpected re-enters the law via its environment and puts it to a strong communicative test. Its genuine distinction is called into question in its own language. The environment wants to have a say within the law, as it were. It claims communicative relevance.¹⁴⁷ Such a re-entry generally tends to disturb a system’s operations, thereby leading it to develop structural changes, or, in other words to learn. In this way, while the first constellation of legal regulation stands for structural stability, the second constellation of normative re-entry triggers structural change.

When asking for the significance of the suggested interpretation for the sociology of law, we can now refer to the four discourses of differentiation that have guided the analysis so far. How would they deal with the connection between diversity and law?

In the first discourse (“integration”) representing sociology as an empirical science combined with a model of social order as identity and a specific concern for the integration of society, multi-normativity does not occur as a particular aspect of theory or empirical observation. Insofar as the law serves

146 NEVES (2013) 139 ff.

147 The picture of the environment having a say, drawn by David Kaldewey, has a particular relevance with respect to the sociology of science: KALDEWEY (2013).

as the integrative mechanism of society, normative heterogeneity and competing normative claims have to be treated as objects of legal regulation.

The second discourse (“equality”), representing sociology as a normative theory combined with a model of social order as identity, and a special concern for structural inequality, would have to treat diversity in a very similar way. As far as it can be deduced from the structures of the discourse, multi-normativity is not the focus of interest, nor is the internal structure of the law. In its Marxist reading, the discourse results in social determinism, blinding itself to the possibility of heterogeneous normative worlds. Diversity would mainly occur as a question of inequality calling for justice as equality. In the Habermasian version, it is built upon the assumption of a basic normative identity of society.

The third discourse (“alterity”), representing sociology in a normative perspective combined with a model of social order as difference, would treat diversity as radical ‘otherness’ calling for regulated difference. In this way, it could be interpreted as a manifestation of the above-mentioned first constellation, the legal regulation of societal differences. A recent example can be found in the decision of the German Constitutional Court (*Bundesverfassungsgericht*) on intersexuality.¹⁴⁸ The case and the justification of the decision demonstrated an element of ambivalence between claiming difference and demanding equal treatment simultaneously, an ambivalence that had already been previously mentioned in gender theories and theories of ‘otherness’.¹⁴⁹ Against this backdrop, the third discourse also systematically underestimates the multi-normativity embedded in diversity.

The fourth discourse (“differentiation”) representing sociological theory as empirical science combined with a model of social order as difference appears principally in sociological systems theory. Its strategy is a typical socio-legal one, given its focus on the dependence of the law on its environment. At the same time, in contrast to other discourses, it takes the internal structures of the law and its autonomy into consideration. It thereby achieves external description and self-description simultaneously and integrates them into an empirical theory of law. The role of diversity in this discourse is rather prominent. The phenomenon of multi-normativity is self-evident for systems theory. It can be identified in the very foundations of the

148 Oct. 10th, 2017 – 1 BvR 2019/16.

149 TÖNNIES (1993).

sociology of law, namely Luhmann's sociology of norms,¹⁵⁰ where he put forward a general empirical theory of norms, built on the core concept of (communicated) expectation and thereby conceptually open to the phenomenon of multi-normativity.

With Luhmann's sociology of law, in other words, a sociological theory is available building on the assumption of a multiplicity of autonomously operating societal spheres or systems. They each produce their own normativities¹⁵¹ and thus create a basic multi-normativity. This constellation does not provide for trivial forms of dependence. The theory, therefore, combines internal and external perspectives and integrates systemic autonomy and system-environment relations. The complex of law and diversity is directly embedded in this constellation.

With respect to the relationship between system and environment, however, – as has already been suggested – the systems theoretical approach is open to further improvement. As regards the sociology of law, this relationship becomes visible in two forms: firstly, it concerns the epistemological level already discussed above. It calls, in other words, for conceptual strategies allowing for a more complex relation of science and practice within the architecture of the reflective theory. The point has been discussed above under the label of “the environment having a say within the law”. At this point, the theory seems to be open to significant diversification and enhancement in the future.¹⁵²

Secondly, the system-environment relationship concerns the subject level, where the law's influence on environment is at stake. Debates about the law as an instrument of societal steering and governance pervaded science and politics in the 1970s. In those days, Luhmann criticized – with convincing arguments – the whiff of naïveté in cybernetic concepts connected with judicial reforms based on “objective data”¹⁵³ and with ideas of “rational policy making” that had introduced a strong element of social engineering into the debate. In his critique, however, Luhmann always remained bound to the concepts of the 1970s. With respect to legislation, political planning, and societal steering – and implicitly societal norm building and learning

150 LUHMANN (1972).

151 BORA (2006, 2008, 2010).

152 BORA (2016b).

153 STREMPPEL (1988).

law – he more or less left his position unchanged despite theoretical and practical developments in the following decades.

On the one hand, however, since the 1970s, legal theory has made significant progress. Debates about private regimes, non-state and transnational law, emerging norm systems in the digital realm, and other phenomena have arisen. Multi-normativity, trans-constitutionalism, and multi-lateral norm formation¹⁵⁴ are much-debated issues. Legal theory and practice, in other words, do react in many ways to social change and to rearrangements in the relationship between law and its environment. In this process, the issue of exerting influence, of societal regulation, has also been the *idée directrice* in theories of law, regulation, and governance over the past decades, often hidden behind various scientific semantics, but always steering the debate.¹⁵⁵ Legal theory, therefore, has indeed adapted to changing empirical relations between the law and its environment.

The sociology of law, on the other hand, has admittedly not always been able to keep pace with these developments. The sociology of law, in close connection with aforementioned legal theories, has produced a number of innovations on the level of society and its functional subsystems, including a sociology of constitutions, that can be counted among the most innovative, creative, and sophisticated fields of sociology. Quite apart from that, however, the implications of multi-normativity remain unnoticed on the level of professions and organisations, for instance, although both fields are immediately linked with the systems-environment relations of the law. Professions are sociologically relevant with respect to the mediatory and conflict-resolving capacities of legal professions and their respective impact on extra-legal practice. In this way, and also with respect to organisations, the sociology of law is so far more or less exclusively concerned with research in courts and the judiciary (*Justizforschung*). Empirical data and theoretical concepts would, therefore, suggest a much broader and more sophisticated research programme with advanced concepts of steering and governance, innovations in reflexive law, and a stronger interest in the organisational world.

Such a socio-legal interest in organisations also illuminates the role of hybrid boundary organisations with respect to multi-normativity and the problem of normative re-entry. They often occur as intermediary institu-

154 WIELSCH (2019).

155 BORA (2014, 2015, 2017).

tions,¹⁵⁶ such as ethics councils ostensibly having the function of policy advisory bodies, but, on closer inspection, acting principally as constitutional councils. One could also mention self-regulatory bodies in various social contexts, such as science, education, or economy. Private standard setting, corporate codes of conduct, or private codifications on corporate social responsibility, as well as the wide field of social constitutions at the margins of the law could also be brought up in this respect.

Against this backdrop, the hypothesis is that such cases of regulated self-regulation or of reflexive governance must function for the law to externalize the problem of competing normative validity claims while simultaneously giving the environment influence on the law. Within the law, the mediating effect of the hybrid boundary organisations generates stability and variability at the same time. This is exactly because they are not (and cannot be) concerned with the deployment of dogmatics, such organisations inducing the production of new legal material – or at least some of their elements – generated from the plasticity of principles in their hybrid communications connected to a multiplicity – diversity – of social fields and their respective normativities. As a consequence, they enable learning processes in the law as a functional system.

These very few and rather coincidental examples can at least illuminate that diversity as a social semantics – manifesting a particular combination of demands for distinction and inclusion with legal addressability – with its aspects of multi-normativity keeps the reflection of the law discernible. In this continuous process, new distinctions and calls for inclusion can be expected, this in tandem with the law's capacity to treat multi-normativity with the instruments briefly described above and also with new tools emerging from a learning process triggered by the persisting irritation of re-entering competing validity claims.

4 Concluding remarks

The aim of the article was to give a brief account of the relevant sociological theories of differentiation, of the importance of social inequalities and of the semantics of 'diversity' with respect to the law. In doing so, the paper is intended to contribute to the comparison of European and Latin-American

156 BORA (2015).

legal thinking and to enable a relation of different national legal cultures. In pursuing this goal, four theoretical discourses of social differentiation have been used as an analytical tool. They have left their mark on sociological thinking in various manifestations for over a century. Conceptually, they are constituted by two dimensions, namely by their epistemological construction as either empirical or normative, and by their concept of the subject area of social order as either identity- or difference-oriented. The four discourses provide different approaches to the question of law and diversity in a twofold manner. Firstly, they offer various concepts of social differentiation and thereby of diversity. Secondly, they differ from each other in their respective ways of approaching the law and its relation to social differentiation.

With respect to these four discourses, the most complex and comprehensive description of the relationship between law and diversity can be found in the empirical theories of social differentiation – in other words, in the fourth discourse. In contemporary sociology, this perspective is most clearly epitomized by sociological systems theory. It provides a comprehensive, profound, and sophisticated sociological theory of the law, as, in contrast to its predecessors, it is capable of explaining the internal mechanisms of legal communication systems. Moreover, it is a genuine sociology of law focusing on the interrelations between the law and its environment. In doing so, as outlined above, it enables external observation and self-description at the same time integrating both perspectives in a coherent theoretical architecture.

Regarding the central theme of ‘diversity’, a semantics combining normative postulates for distinction and for inclusion, systems theory represents the only discourse, as I should argue, for which diversity is a deeply relevant systematic concern, insofar as it embodies the figure of multi-normativity triggering normative re-entry. The phenomenon of multi-normativity can be found at the sources of the theory, namely in its concept of norms. Luhmann’s sociology of law offers an empirical theory of norms which, as such, contains the possibility of multi-normativity. The same holds true for the figure of re-entry, which is central to the systems-theoretical fabric.

Being anything but a completed theory or a closed set of concepts, systems theory, however, has to be conceived of as an unfinished project open to future amendment. Two aspects have been highlighted in which the current state of the theory seems to be somewhat unsatisfactory. The first

concerns the epistemological position of the theory with respect to the relationship between sociological observation and the reflective theories of the subject area. The second can be found in a certain reluctance in systems theory to address phenomena of societal steering and governance, a hesitation that does not seem overly compelling with respect to the developments over these last decades.

What makes ‘diversity’ an important issue against such a background is the fact that it serves for more than keeping the law operating, as was argued above. Moreover, it has the potential to irritate socio-legal theories and to furnish them with social and conceptual complexity that will also certainly initiate further learning processes in the reflective theories of the law.

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Law, Diversity and Sociological Imagination in Argentina (20th–21st Centuries)

1 Introduction

Thinking about the theoretical foundation running underneath the topic of diversity in Argentina, allows us to understand not only the potentialities for the emergence and recognition of the problem but also the limits inherent to each system of thought at different times in history. In the case of sociology in its connection with law – legal sociology –, this presents some additional difficulties.

The first question to keep in mind is the role of the discipline within the legal field.¹ Despite the usual qualification of legal sociology as a simple auxiliary science, it plays a central role in structuring the mentality of jurists. On the one hand, it presents the jurist with an image of society that constitutes a view of the world (a legal representation of society), often without expressly declaring the theoretical content that informs such a perspective. On the other hand, it functions as a narrative device that rewires the dud circuits of the positivist legal system in its autopoiesis, especially in times of crisis, when law fails to adapt quickly enough to social problems. As can be seen, there arises here a first structural question in terms of understanding the formation of legal knowledge: the relationship between sociologists and jurists. It is now in this constant tension, where the hermeneutic paradigm moves from integration, to equality, alterity or differentiation – as ways of addressing the topic of diversity. This paradigm has mutated over time, showing how the formation of legal-sociological knowledge is, on the one hand, related to providing stability to the legal system, and, on the other, it fulfills a role of scientific mediation between the political, the social and the legal sphere.

1 BOURDIEU (1976).

The second problem presented by the theoretical foundations for thinking about diversity is the historical variability exhibited by models within the socio-legal tradition. If a question about the existence of a ‘tradition’ is raised in Germany,² in Argentina, it is enough to recall a fragment of Borges which, although dedicated to literature, can be predicated on sociology: “What is the Argentine tradition? [...] I believe that our tradition is the whole of Western culture, and I believe that we have a right to this tradition. [...] We can handle all European issues, handle them without superstitions, with an irreverence that can have, and already has, fortunate consequences.”³ This phrase sounds like a warning as to the plurality of authors and theories that were recovered in Argentina, but also, and above all, concerning the irreverence of their treatment, which implies adjustments and translations that may surprise European readers. This irreverent appropriation can, however, be denounced as “an unbearable hermeneutic nihilism”.⁴ In order to avoid falling into a simplified theory which explains the selection of a tradition as a consequence of the taste of each author, it is fundamental to contextualize the political and social dimension that impacted on the configuration of the juridical field at different moments in history. This will aid in understanding the conditions of possibility for the reception of diverse sociological theories: North American, German, French and, later, Lusitanian-Latin American.

This warning requires observing jointly the tension within the legal field (jurists-sociologists) in the modus of production/appropriation of sociological theory in differentiated historical contexts (political, social and theoretical). This operation makes it possible to recognize different legal representations of the social and also particular theories on diversity. In order to do so, we shall go through three political contexts for the formation of a particular sociological imagination, each one of which establishes specific presuppositions that impact on social theory to make the juridical system work under alternative sociological traditions and *vice-versa*.

2 See the contribution by Alfons Bora in this volume.

3 BORGES (1996 [1932]) 272–273.

4 GADAMER (1990) 100.

2 In the beginning ... there was the *nation*

One of the key elements for thinking about diversity in juridical sociology relates to the history of social sciences in Argentina (1890–1930). In this case, the selective tradition of the handbooks of the present as well as the historical studies are coincident. Both juridical sociologists and historians recognize in Juan Agustín García and Ernesto Quesada the precursors of socio-legal thought in Argentina.⁵ Although legal sociology was not yet a curricular subject, through *Sociology* (1904), *Introduction to Law and Political Economy* (1903, 1907), the role of the jurist-sociologist would establish the study of social sciences in Argentina.⁶ At this genetic moment of social discipline in law, but for in the problem of the method, in a dispute of social science against the traditional exegesis of law, the tension between jurists and sociologists went unexpressed.

It was a period of social conflict over immigration, criminality and other problems which exhibited the limits of liberalism. It was also a time of reception of various foreign theories, but with an approach that would be necessarily national. In other words, not only Savigny, Mill, Schmoller, Comte and Spencer were recovered, but also, in their translation processes, the common tone of the Argentinian readers would be to think about social problems based on national particularities. This mediation would also be observed in a context that presented the need to mediate between the classical political economy (of strong individualism) and the socialist positions, which were regarded with fear. This is how history and sociology were articulated, predisposing a State intervention in Argentine society. These jurists (sociologists) had a local, historical (in the sense of building a national tradition), deterministic and empirical method. This was reflected in a common pre-comprehensive basis of the difference that would be articulated under Darwinian and Spencerian influences by the vision of progress of the (national) civilization.⁷

This state of the art of the discipline would lead Quesada and García to ask themselves about how to conceive a national unity that would solve the problem of migration and, at the same time, how integration would or not promote the progress of the nation. Here the elements of “environment,

5 FUCITO (1999) 262–267.

6 ZIMMERMANN (1995) 83–100; TERÁN (2008) 207–287; DEVOTO (2006) 15.

7 ALIAMIRANO (2004).

race and epoch” would dominate the positive question of the integration and homogeneity of Argentine society.⁸ In this framework, the debate on the ‘national question’ was developed with the aim of ascertaining the population logics of the young nation. In order to do so, the narrative deployed by these authors presented a social basis conformed by Europeans as a constitutive element of Argentinian National-being, which was thought of as the possibility (and the reason) for overcoming the indigenous past and the Hispanic tradition (both considered backward). This prejudice is understood by the influence of the national imagery of Alberdi – the father of the constitution – who dreamed of Argentina as a result of a transplanting of northern Europeans, marking France as an ideal of civilization. The main problem, then, was not how to reconcile the indigenous peoples with the European immigration, but how to generate a ‘good mixture’ between the Creole – consequence of the first immigration – and the new migratory waves that arrived in the country. This would determine the problem of race derivations, which could start from either a Creole or foreign base. This model would occlude the indigenous character of the population as a problem and as a type, while, at the same time, producing a European take on the development of nationality.⁹

The government of the social therefore also implied a theory of the national being, of origin or derivative, but projected toward the future. On this tone, for Ernesto Quesada – who rescued the moral and psychological perspective of a people rather than the pure Darwinian determination – the problem of immigration subsumed that of the national language, adopting a “Creole-based derivativist” view that implied: “preserving the autochthony symbolically and materially incorporating foreign contributions”.¹⁰ Thus, he stated that the *gaucho* had resulted from the transplant of Spaniards to the *pampas* in the 17th and 18th centuries, to which was added the work

8 TERÁN (2008) 214.

9 TERÁN (2008). On the concept of race and the uses of the period see: ZIMMERMANN (1992). This eradication of the indigenous question would be a fundamental part of Argentina’s social imagination, especially of the socio-legal imagination for thinking about modern law. Hence heterogeneity and integration would be thought of as a problem of transplanted Europeans of different generations.

10 TERÁN (2008) 241.

of the environment until the 19th century. However, this crystallization of a special being had already disappeared at the end of the 19th century leaving only a myth that should be rescued to defend the best of the nation from the new immigrants (especially Italians). The *gaucho* became a literary topic (myth) and recent immigration (the material fact) that would define the problem of hybridization. This perception of the future was not entirely desired, hence the need to intervene in language, in symbolic forms and in the processes of unification transmitted through the elites, who represented this original past: the *gaucho*. Although the problem of diversity was perceived as a negative factor that brought social difficulties – ungovernability –, the “plurality and hybridization with data from the Argentine process [was the price] that a modern like Quesada was willing to accept as a tribute to progress”.¹¹

The work of Juan Agustín García would have a greater influence. According to Tau Anzoátegui: “the impact he had on his disciples and students was strong in that it highlighted the social roots of law, criticized the theory of codification and stimulated the study of Argentinian social phenomena.”¹² In the first edition from 1896 of his classic book *Introducción al estudio de las ciencias sociales argentinas*, he warned:

“First of all it is necessary to know the national character, a very complex thing and difficult to analyze. It has been shaped by all the past generations that handed down to us by inheritance innumerable moral qualities, the physical environment; the social environment formed by intellectual and moral development, in which the races that immigrate and join our sociability actively contribute; European culture, our main source of inspiration and science. Our sociability, although legally one and the same, is composed of different elements, some simply superimposed, others amalgamated by the irresistible tendency that leads us to moral unity.”¹³

In this fragment, García condensed the sociological common sense that would imprint itself on the legal knowledge where “the national character” figured centrally. In that search, there was the superposition or amalgamation of races in Argentina as a central element in understanding society (and its government) under the abstract legal equality proposed by the codification. However, in the third edition of 1907, at the time of thinking about diversity, the gaze of social psychology became a state:

11 TERÁN (2008) 242.

12 TAU ANZOÁTEGUI (2007) 22.

13 GARCÍA (2006 [1896–1899]) 374.

“The problems of Argentine psychology are complicated by the variety of more or less antagonistic and diverse elements that contribute to forming society. While the different races in contact are not founded on a single one by the predominance of any of them, the characteristic note of our people will be heterogeneity, division and subdivision into groups, with radically different ideas and feelings [...]”¹⁴

The fear of immigrants was based on the ungovernability that this subdivision produced, so the path toward heterogeneity had to be repaired.¹⁵

As can be seen, in thinking about Argentine society, it was a question of discarding what was considered weak and backward (the aboriginal peoples) yet, at the same time, representing the problem of diversity as hybridization. The consequences of this position would structure the socio-legal knowledge until the 20th century. It would thus become an urban problem, of relation between codification, progress and social control as structural elements of a discourse, which was rarely disputed by the socio-legal imagery.

In this way, the model thought in the logic of progress and of the nation proposed a two-faced social knowledge and sociological imagery. In Comtean terms, this model could be synthesized in a *savoir* that was phylogenetic and historical (by a historicity regime of the concept of nation); and in a *prevoir* as a horizon of expectation that envisioned a special society manifested only in the future (not without the aid of state intervention). Therein lay the logic of the ‘melting pot’ of the modernist project in the birth of sociology (of jurists). Not by chance, ‘introduction to law’ would remain in the hands of legal historians who could recompose the genetic magma from which the present came.

3 State and society: State theory and scientific sociology

By the end of the 1920s, the social science model was in retreat owing, in part, to the supposed inability to articulate a political process in a deterministic code, as well as to the inability to problematize the ethical dimension of law.¹⁶ This aporia would allow the entry of legal philosophy which, based on German and Italian roots, would be established as the fundamental introduction to legal studies.¹⁷ This change can be synthesized in the *Insti-*

14 GARCÍA (1907 [1899]) 49.

15 TERÁN (2008) 235.

16 TERÁN (2008) 148.

17 TAU ANZOÁTEGUI (2007) 34–35.

tuto Argentino de Filosofía Jurídica y Social (Argentine Institute of Juridical and Social Philosophy), where diverse authors coexisted. They positioned legal philosophy with preeminence over sociology. There, however, arose a tension that would allow a better understanding of some representations of Argentine society. In this context there would appear, on the one hand, an Aristotelian-Tomist aspect that would become the thought about the State (theory of the State) and, on the other hand, a neo-Kantianism based on the influence of Kelsenean juridical positivism. Both traditions, coexisting and in dispute, would not fail to present the ontic and axiological element as crucial.

This philosophical turn would redefine the topic of juridical language at the same time as the redefinition of the relationship between jurists and sociologists, who would be involved in the question of *Sein* and *Sollen*. The result would be a new language of law. In the case of Thomistic aristotelism, it would result in the problem of *Sein*, the State, the political community and the constitution, in clear correspondence with the Schmittian grammar.¹⁸ This relationship would suture the problem of the nation as a hybridization of races, presenting in its place the univocal entity of the people. The significant effect of this new language would be to suppress the separation between state and society.¹⁹

Precisely Ernesto Palacio's first State Theory would define its object in connection with political science, which studies "the polis, or organized human society, not in its written legislation [...] but in its historical projection and in its totality, specializing in its expression as a State, that is, the relationship between governors and governed, the active and passive subject of power, as will and as action".²⁰ The diversity within the State was given by that structural position in the organization that was projected as the relationship between the personal power of the leader, the ruling class and the people. This redefinition of the field of study would present the problem of 'order' as the conformation of a legitimate social hierarchy ultimately requiring the recognition of "a cultural tradition embodied in successive personalities whose thought and action have left a mark on the collective

18 DOTTI (2000) 13–24.

19 SAMPAY (1951) 99, 374–375.

20 PALACIO (1962 [1949]) 15.

mind”.²¹ This anti-liberalism would end up postulating a government without interference from the ruling class, paving the way for the formation of a ‘real’ rather than a ‘legal’ constitution. For his part, Arturo Sampay would be more careful of the role of political sociology, ranking it as the knowledge prior to constitutional law.²² In that framework, in the face of the crisis of constitutional liberalism, the thought of social plurality would be subsumed under the question of corporatism. Clearly, recognizing a state totality under this intermediate instance, the workers’ and employers’ unions remained as a representation mechanism, but also as a sociological data of the diversity of social groups.²³

The reaction of neo-Kantian logical positivism would be a rejection of what they would call the Thomistic “iusnaturalism” that presupposed a natural law.²⁴ On the one hand, it would reject the existence of a superior norm of order by turning to positivism of Kelsenian root. It would also link this rule to a problem of conduct. In this way, legal sociology would be seen as a perspective of interest, although not as part of the legal science.²⁵ The closure of the positivism on the norm and conduct with a shift toward the ontological question of law would be accompanied by a hegemony of the ‘juridical dogmatics’ that would obturate, in part, the question of diversity.

In this dialogical dimension, the State theory would be the space to think through the social, especially in its political-constitutional dimension, which would be accentuated by the rise of Peronism to government and the constitutional reform of 1949. The problem of thinking about diversity as corporatism and as representation of the people configured by the world of labor would not only deepen the oblivion of ethnic and social bases, but would also blind the representation of a possible self-regulated society as opposed to the State.

Faced with this dilemma, Argentinian legal sociology found its object through a turn in constitutional law and the need to break with the logical structure of the State theory. The monumental work of Segundo V. Linares Quintana is a good example of the “destatization of the political”, pointing

21 PALACIO (1962 [1949]) 132.

22 SAMPAY (1951) 502–503.

23 RAMELLA (1993 [1945]) 281–289.

24 COSSIO (1937).

25 COSSIO (1946).

out that the representation of society as part of the State simplified the true meaning of social and constitutional thought. The latter dealt with the problem of “power in society” as distinct from the State, seen rather as administration. Power in society would determine the problems of legal sociology in its rediscovery of society: lobby groups, interest groups etc. This ‘rediscovery’ of society, in turn, would have its political basis in the confrontation with Peronism and statehood present in Peronist constitutional rhetoric.²⁶

Such confrontation – political and epistemological – would produce a change in the way society was studied. Contrary to the State theory, scientific sociology would be closer to North-American modernization theories, which would reconfigure the imagery on the social problem adopting mainly structural-functionalism as a prism of analysis.²⁷ It can be seen here how sociology would reconfigure the status of the jurist and the juridical sociologist, imposing the latter as an auxiliary of the constitutionalist and, at the same time, linking him more and more to general sociology. Here it is worth highlighting the central influence of Gino Germani and his *Estructura social de la Argentina*, which would compose an image of Argentine society, with a structure that represented the (urban) society and its diversification as a system of “high”, “middle” – extended and almost majority – and working classes.²⁸

4 Modern legal sociology: structural functionalism and integration through inclusion

Faced with this context, legal sociology would have to find its own space between the critique of legal dogmatics and philosophy of law. In this way, society was rediscovered as an object that had to be explained taking into account the illusion of the Kelsenian uniform and pyramidal legal system, which was represented as the totality of the science of law. Society was thus newly explored as an object of study in legal sociology and its possible ‘diversity’ would be examined under the lens of American hegemonic sociology. The themes of legal sociology, measured from an ideological perspec-

26 CASAGRANDE (2018) 194–195.

27 ADAMOVSKY (2009) 349–360.

28 GERMANI (2010); CARDINAUX/GERLERO (2000) 154–156.

tive that implied similarity between Argentina and the United States, would be: social control and deviation (Robert Merton); the system of expectations and social position – status, roles – in the social structure (Talcott Parsons); socialization and ideology (Ralph Linton, Gordon Childe), and so on.²⁹

In a geopolitical context of conflict between communism and capitalism, added to the various military dictatorships that Argentina experienced, Marx's reception would be critical and little thematized.³⁰ Clearly, the reductive readings of the Marxist approach were not only the fruit of an interest of authors but also part of the characteristic censorship of these regimes. The key theme, however, was also Peronism as a mass phenomenon, which would postulate the question of authoritarian personality and the types of charismatic domination that would become a central theme in the construction of the socio-juridical imagination in Argentina.

Hence, the most important receptions of European sociology, which would influence the new classic founders of social thought – primarily, Durkheim and Weber – were initially strained through Parsons' sieve.³¹ The problem of differentiation would, however, rarely be addressed, but rather, the point was to recover the role of law in theories. Thus, in Durkheim's case, the methodological function of law (as a social fact) was studied in order to observe solidarity; the role of punishment in the reassurance of collective consciousness; and finally, the problem of anomie. On this central point, the readings were varied and 'irreverent'. Indeed, under this sociological concept, the recurring question was synthesized: why is law not respected in Argentina? This key topic used anomie to synthesize the different reflections that mutated from race at the beginning of the 19th century to the theories of imitation from the middle of the 20th, allowing for recognition of the sociological discourse that served as a basis in the different stages.³²

In Weber's case, the theory of social action and rationality both in law (legal) and in the modes of domination (legal-bureaucratic) had a double effect. The first was to reinforce Parsons' approach to social action as a structure for thought on the social phenomenon, the subjectivism of which

29 VES LOSADA (1967).

30 Here we see the influence of Robert Nisbet as a critical model towards classical Marxism: NISBET (2003 [1969 first Spanish edition]).

31 ALEXANDER (1987).

32 NINO (1992); KUNZ (2008).

fit very well with the logic of subjective modern law. On the other hand, the type of charismatic domination would serve to attack Peronism and confront it with the type of legal-bureaucratic domination that was expected in terms of overcoming (evolution-modernization) political practices in contemporary Argentina.³³ As can be seen, legal-sociology also provided adjustment tools for the understanding of the political through the social.³⁴

The configuration of the socio-legal language would then be given by the grammar of systemic-functionalism: social structure, status, roles, action, modernization-evolution. As for integration, Parsons is recovered to point out that law is “a generalized mechanism of control that operates diffusely in almost all sectors of the social system”.³⁵ Parsons is also a cognitive filter that would serve to incorporate Luhmann’s theory of systems which would be seen as an extension of the logic of Parsonian systems and subsystems. That reception, however, has been lateral and counts more as an anecdotal fact in legal-sociology handbooks than as an explanatory theory of diversity. Diversity as differentiation in Luhmann’s system has, therefore, been little noticed in its full dimension.³⁶

Beyond this theoretical exposition by authors, and although handbooks do not deal with it in greater depth, in sociology and legal sociology programs of law schools, the model of integration *via* inclusion refers to the problem of migration addressed from an evolutionary perspective as the integration of countryside – defined as traditional society – into the city – defined as “industrial or modernized society”. The crisis of modern society is thus inevitable, but it is a cost to bear in order to overcome the traditional, undifferentiated and totalitarian mentality in Argentina. A referential text is Gino Germani’s “Assimilation of migrants in the urban environment” [*Asimilación de los migrantes en el medio urbano*], where the migrant situation is studied at the ‘environmental’, ‘normative’ and ‘psychosocial’ levels, from which arise the capacities of *assimilation*, dependent on the categories of

33 GERMANI (2010 [1962]): “Massive immigration and its role in the modernization of the country” [*La inmigración masiva y su papel en la modernización del país*].

34 An interesting fact is provided by Germani when analyzing the social groups of the island Maciel, when emphasizing that the “families” of old residence showed “more cooperative and democratic attitudes” while those of recent migration showed “a more authoritarian climate”. See GERMANI (2010 [1967]) 425.

35 FUCITO (1999 [1993]) 240–246.

36 Hence many of the dialogical disconnections between Germany and Argentina.

adaptation (capacity of the subjects), participation (which includes the institutions in the reception space) and ‘acculturation’ (as the learning process of the migrant), all of which produce a general integration.³⁷ The main ingredient that Germani took into account was the psychosocial factor in relation to the normativity (formal and informal), where the concordance between the expectations of the actors and the normative system would not produce any deviation.³⁸ Faced with this ideal type of reference, migration produced various social conflicts, however resolvable through good integration. As can be seen, the game between integration and social action redefined the key issue as deviation.³⁹ From there, it is possible to understand the rapid shift toward North-American criminology as a key issue in legal sociology.

Until then, the question of cultural diversity had not been openly put into play. Its incorporation has, however, been due more to the problem of criminal subcultures than to the question of differentiated identities in Argentine society. It is in this criminological field, in particular, with the reception of the Chicago School, where the issue has been most problematized, but also as a derivation of the problem of integration *via* inclusion. The studies of W. I. Thomas and the social ecology have particularly served for dealing with the problems of social integration, especially of the immigrants in the *barrios*.⁴⁰ This reception was, however, critical because of its deterministic framework. Thus, theories about youth and the way crime is learned through differentiated association have sociologized the dimension of diversity in subcultures.⁴¹ The problem of the subculture is clearly presented from the systemic viewpoint, but the problem is the understanding of deviance and its solution was tinged with a preventive rather than problematizing character of social conflicts in highly differentiated societies. The logic remained urban and characterized as the conflict within an imagined society that, as a result of the actions of several historical folds of discourses, occluded the problems of aboriginal peoples, social movements, gender and the various forms of cultural diversity in the face of the legal system.

37 GERMANI (2010).

38 GERMANI (2010) 470: “In a perfectly integrated society, without deviations from the ideal standard, the normative framework would be exactly reflected in the internalized attitudes and expectations of individuals”.

39 See the contribution by Alfons Bora in this volume.

40 PARK et al. (1967 [1925]); THOMAS/ZNANIECKI (1977).

41 TAYLOR et al. (1977).

It is perceived, then, as the way in which, in accordance with the North-American sociological imagination, the categories of juridical sociology were defined in Argentina and, from there, as the representation of society with a diversified social structure, with migrations and problems of assimilation that had to be solved by means of proper integration. The formal system of law and the culture of urban reception proved, in any case, an ethical teleologism that, under the logic of modernization, had to subsume the cultural backwardness in the modern-urban society. In the field of socio-legal knowledge, this perspective must always be considered in the light of the strong hegemony of legal dogmatics – in other words, without calling into question the incapacities of the formal legal system. This tension between dogmatic jurists and sociologists was exerting more and more pressure on sociology to dedicate itself to the study of the phenomena of normative application and the functioning of the legal system: access to justice, criminality, theory of the organizations of justice and administration, and so on.⁴² An extension of topics was therefore observed under a model of structural-functionalist analysis, although with recent modifications in light of the new legal sociology.

5 From Europe to Latin America, diversity in the context of the legal crisis

The return of democracy in 1983 has been marked as a milestone in the development of social sciences in Argentina. In legal sociology, it would undoubtedly be a foundation for the reception of various authors, but always under the traditional model that characterized the discipline. Clearly, the reception of authors and key themes in thought on diversity will take time to dismantle the theoretical apparatus of the discipline. However, towards the 1990s, a reception of Habermas and the theory of communicative action can be appreciated, which would be read as key in a participative democracy as a transforming factor in the social reality. Although this normativistic aspect of inclusion would be touched by sociology, its use would quickly move toward the field of legal philosophy and legal theory. Legal

42 GONZÁLEZ/LISTA (2011). This pressure can be observed in the constant attempt to remove legal sociology from the curricular plan of the faculties, making them optional or reducing their schedule.

philosophy (in its analytical face) would dominate the political-institutional and cognitive scene during the first decade of democracy in such a way that its influence would bring the thought of law towards philosophy, also dislocating the role of sociology. This first moment of reception, however, was accompanied by a process of decomposition of the social fabric, which would result mainly from the neo-liberal reforms of Menemism.⁴³ The study of law would thus quickly overcome the question of facticity and validity, awakening a new sociological imagination that could no longer be anchored in structural-functionalist theory or in the reforming illusion of democracy.

Such a crisis of the identity of law that could no longer be thought of as a transforming factor per se along with the increase in social conflict would determine a radical change in the theoretical perspective, especially from 2001 onward. At this time, legal sociology initiated a break with the juridical, transforming itself into a movement of sociologization of the discipline: that is to say, recovering the sociological knowledge before the juridical and ius-philosophical which had been enclosed in a new dogmatic – not without innovations – but, at the same time, maintaining a distinct autopoietic rationality. Indeed, the economic, political and social crisis would configure a double hermeneutic turn in sociology, on the one hand, toward the reception of the most critical European sociology – Foucault and Bourdieu, above all. On the other hand, there was also a decolonial and anthropological turn that would seek to approach Latin-American problems from the local perspective.

In this combination of influences, the productions and bibliographies would gear themselves toward local problems with renewed perspectives: at this time, the concept of diversity together with the concept of multi-normativity would penetrate the vocabulary of legal sociology. As for Bourdieu, the reception of his theory would be reduced, above all, to the incorporation of his reflections on the juridical field, proposing a new reading centered on the formation of legal thought and action, which would avert the systemic gaze.⁴⁴ Foucault's work would have an impact on two fields. In criminology, it would break with the view on deviation, resending the problem to the production of normality and discipline; but also his "History of

43 PUCCIARELLI (2011).

44 BOURDIEU (2000). This reception can be found ubiquitously in the general bibliography of legal sociology.

sexuality” would produce a strong effect for the study of the problematic of sexual diversity, which reverberates in several works on the LGBT collectives.⁴⁵ Radical criticism of the concept of normality would open the door to thinking about diversity by assuming the normative framework of human rights with the recognition of the dignity of the person before state practices and formal law.

The greatest impact would be given not so much by the reception in manuals and texts on sociology, but rather by a bibliography that was incorporated as ‘secondary’ to deal with specific topics. Therein can be observed an epistemological turn to viewing Latin America through as its own categories and social problems at the hub of the actors, which accentuated the anthropological view displacing the model of statistical sociology.

Two clues serve the understanding of the epistemic basis of this turn. The first was postcolonial positioning with a view from the South. Boaventura de Sousa Santos defines it as

“[a] set of theoretical and analytical currents firmly rooted in cultural studies but nowadays found in all social sciences, whose common feature is the primacy given to the theoretical and political aspects of the unequal relations between North and South in the explanation or understanding of the contemporary world. Such relations were historically constructed by colonialism, and the end of colonialism as a political relationship did not bring about the end of colonialism as a social relationship, as a mentality, or as a form of authoritarian and discriminatory sociability. For this current the problem is to know to what extent we live in postcolonial societies.”⁴⁶

The South is not geographical, but rather incorporates a view from the subaltern sectors under colonial social relation – which is also found in Western Europe. This critical turn makes it possible to understand the rise of subalternist trends and the emergence of a question of alternative modernity that, starting from the margins, would render the logic of power more explicit. Secondly, the normativist bet has as its purpose the recognition and reconstruction of a counter-hegemonic practice from plurality.

This culturalist-critical turn with normativist characteristics possesses the peculiarity of being able to apprehend through its wideness, varied experiences and social demands. On the other hand, from the analytical field it moves the legal sociology toward the knowledge of multi-normativity, study-

45 GERLERO (2009, 2013).

46 SOUSA SANTOS (2006) 39.

ing social groups and spaces taking for granted cultural diversity as a model of comprehension. The grammar of legal sociology has gradually been redefined with rather vague categories, but with a system of autoimmunity in the face of criticism for its effective semantics on an emotional-political level: counter-hegemony, alternative rights, multi-normativity, diversity, collective transformation, the fight against discrimination and exclusion, legal pluralism, cultural citizenship and so on.

Although the South is an encompassing category of non-European-North-American experiences, in Argentina the reception of the sociology produced in Latin America seems to confirm more the geographical dimension than the epistemological one.⁴⁷ The influences that have begun to appear as central are those of Boaventura de Sousa Santos, Carlos António Wolkmer, Oscar Correa, – for critical law.⁴⁸ The culturalist and plural turn presupposes diversity as an existing reality, although it is blocked by the traditional Western epistemology of the North. There must, therefore, be a ‘sociology of absences’ to lift the veil that does not allow diversity to be recognized, a ‘sociology of emergencies’ that allows the visualization of that which was obscured by the western and colonial epistemological paradigm.

This, deserves a particular use of the voice diversity that adds to the epistemological pluralism and, consequently, juridical new subjects to analyze: 1) a cultural diversity that cannot be learned by a general theory; 2) an ‘epistemological diversity’, that is to say, plural knowledges that allow for alternative law; 3) an intercultural diversity to think about Human Rights in a non-Western way; 4) a judicial practice with diversity – especially for indigenous communities; 5) a diversity of sources of law that recognizes alternative modes of legal creation; 6) a new constitutional organization founded on pluralism and diversity (primarily after the Bolivian experience); 7) a ‘demodiversity’ to think through the logics of democracy beyond the liberal model, etc.

The European tradition and the narrative on nationality are contradicted by this perspective. The problem is thus observed in the incompatibilities between a constitutional history anchored in the Eurocentrist paradigm and a legal sociology that accompanies a new Latin-American constitutionalism.

47 SOUSA SANTOS/MENDES (2018) 8: “The South is a metaphor for the systematic suffering produced by capitalism, colonialism and patriarchy.”

48 WOLKMER (2018).

In this instance, the question is not sociological but historical, considering the weight of historical narratives, which appears as an obstacle to the unfolding of the new perspective. The incorporation of new problems from Latin America therefore requires the rearrangement of the historical perspective. Criticism of nationalism and statehood somewhat begins to disconnect the European imagination from the traditional historiography of the Argentine Nation (founded in the 19th–20th centuries). However, the reference to the present makes these selective traditions play both in a process of hegemonic dispute.⁴⁹

This new problematic core has produced a recognition of themes that are focused more on anthropology than on structural sociology. To this epistemic picture must be added the process of professionalization of legal sociology research with demands for dialogue with sociologists and anthropologists. There can, then, be seen the emergence of a micro perspective of increasingly ethnographic character on the issue of poverty, territory, studies on political institutions (police, justice, prison), on aboriginal peoples, on disability, feminism and the relationship with patriarchy, on social movements, local politics in spaces peripheral to the State, criminality and youth.⁵⁰

The approach to sociology – of sociologists – rather than law is reconfiguring the discipline, which includes two central problems, which emerge from the specialized differentiation of socio-legal knowledge with respect to law. On the one hand, the anthropological tendency of the scientific field is generating a complex volume of bibliography that does not provide a global view of Argentine society. This central element of the legal imagination, which is required for the deployment of a legal system thought in the Kelsenian or analytical rational way, is in crisis. On the other hand, and in a logic born of the scientific field, the ‘sociologization’ of juridical sociology tends to obfuscate the dialogue with jurists, and, although it demarcates the advance of new perspectives and topics – among which diversity is included –, the isolationism of the new juridical sociology can prepare the ground for the eradication of the discipline from the lecture halls of law faculties.

49 WILLIAMS (2009) 148–165.

50 SVAMPA (2005, 2008); OSSONA (2014); SEGATO (2016); GRIMSON/BIDASECA (2013); KESSLER (2010), and so on.

6 Preliminary conclusions: law, diversity and historical narrative

As can be seen, the appropriation of various theories and fields of research has been a recurrent practice in the formation of the sociological imagination in Argentina, and, although many of them have been, in part, rejected for the ethical problems of their premises (Darwinism, for example), it can be affirmed that their presence has been sedimented in a particular tradition of thought and representation. In this way, beyond the outdated theoretical formation that accompanied the view of Argentina as a European universe (transplanted), these layers of significance persist and are active in the actual legal representation of society. This can be seen in the invisibilization of the problems of the native peoples (*pueblos originarios*) of Argentina, especially in view of the recent deaths of Santiago Maldonado and Rafael Nahuel (2017). These cases and the way in which they were treated by the press and the collectivity, show precisely a process of invisibility based on a foundational trauma, which is expressed in the reinforcement of the myth of white and European Argentina, constituent of the collective memory – especially, metropolitan. Gayol & Kessler have recently remarked:

“We know that Argentine history is marked by the killing and expulsion of the aboriginal communities from their lands, as well as by the denial of this fact, and by the absence of the aboriginal communities in the shaping of our national identity, by a significant part of the population. The traditional narrative of the melting pot of races and its centrality in the basic school formation, as well as the scarce vision from the metropolitan area of the topic, contributed, we think, to not being able to install the topic with the urgency that it possesses.”⁵¹

In this traumatic context, in a moment of post-truth transmitted by the media, the new juridical sociology – which is based on the presupposition of diversity to think about law – must face daily resistance not only in the classroom but also in the juridical-judicial field. The politicization implied by the new sociology is then subjected to a series of traumatic displacements that quickly label any intervention in favor of diversity as the actions of ‘leftists’. This situation harkens back to the latent trauma of Argentine democracy – the last military dictatorship. Thus, selective traditions continue to play a fundamental role societal perspective, which deserves historical reconstruction, something which rarely penetrates the classrooms of law. It is therefore worth highlighting the importance of legal history and a look

51 GAYOL/KESSLER (2018) 243.

at diversity that historicizes the contexts of production of the prejudices found in Argentinian jurists.

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Section II

Traditions of Pluralistic Legal Thinking

Traditions of Pluralistic Legal Thought: The Example of Germany

1 Diversity and legal pluralism

Legal pluralism and diversity are closely linked. Yet the phenomena they describe and the spectrum of questions they each raise must be differentiated. Diversity, as Peter Collin puts it, refers to all kinds of “immutable” or “fluid” differences, like “age, ethnicity, gender, race, physical abilities, sexual orientation”, “education, religious belief, work, experience” etc., and, therefore, represents the broader concept.¹ These phenomena can easily be addressed with legal questions and they could go by the label ‘pluralism’ as well. The traditions of ‘pluralistic legal thought’ or of ‘legal pluralism’, however, focus on problems that cannot be fully accommodated under the rubric of ‘diversity’.

Legal pluralism does not refer just to any kind of pluralism, for, as the term suggests, it addresses legal questions. There are important differences between legal pluralism and other pluralisms, such as political, social or economic pluralism. For instance, even if political pluralism is closely connected to legal issues, it does not coincide with the concept of legal pluralism. Political pluralism raises fundamental questions on how political diversity must be dealt with. Legal forms, like statutes, constitutions, or customs, as well as legal principles, like the rule of law or democratic participation, bear important instructions on that. Be that as it may, political issues need not be solved on a legal plane. Answers to these questions can also be explored through diplomacy or through other channels of political negotiation or through political power. It must be noted, however, that pluralism in political and constitutional theory preceded the notion of ‘legal pluralism’, which came into its own only in the late 1960s and 70s.² This is not only

1 See the introduction by Collin and Casagrande in this volume; on conceptual issues see BRAUNER (2020).

2 See SEINECKE (2015) 58–61.

true for the concept of political pluralism, introduced by Harold Laski in his “Studies in the Problem of Sovereignty” in 1917,³ but also for the renaissance of political pluralism in Germany in the 1950s and 60s.⁴ It was only after invocations of ‘pluralism’ began to proliferate in political and constitutional theory that its use in legal history and legal anthropology came to be branded as “legal pluralism”.⁵ From there on it migrated back to political theory, before finding its way again into legal theory.⁶ Even though political pluralism and legal pluralism have much in common, a sharp distinction needs to be drawn. The issues legal pluralism addresses are fundamentally legal in nature and relate not just to the concept of law in general, but more specifically also to the legal sources, the methods, and the doctrine, as well as to the conflict of laws or jurisdiction and to legal identities.

The relationship between legal pluralism and legal diversity is two-sided. On the one hand, the normative agendas they pursue are different. While legal diversity explores the question of equality, for legal pluralism equality is not an issue.⁷ Legal pluralism juxtaposes different legal orders, conflicting jurisdictions, coexisting legislators, and competing concepts of law. That is why equality cannot be a core issue for legal pluralism. On the contrary, from the perspective of legal pluralism, the idea of equality is always susceptible to ideology. If the legal life world of a group, for instance, an indigenous group, is treated equal to the so-called ‘modern’ Western law, and, therefore, is measured by ‘modern’ Western legal standards and backed by ‘modern’ Western power, the notion of equality becomes highly vulnerable to ideology. On the other hand, legal pluralism fits into the theoretical perspective of legal diversity. It grants the power of legislation and the monopoly of law to many communities. Therefore, legal pluralism is closely linked to questions of group identity and culture, to legal autonomy and rights – questions central also to debates on diversity.

In what follows, the history of pluralistic legal thought in Germany will be delineated. Here ‘pluralistic legal thought’ will be used synonymously

3 LASKI (1917); on Laski see SEINECKE (2015) 56–57.

4 See STOLLEIS (2011) 255–258; SEINECKE (2015) 57–58.

5 E. g. KOSELLECK (1967) 33; BENDA-BECKMANN (1970); GILISSEN (ed.) (1971).

6 E. g. SANTOS (1977); SANTOS (1987); SANTOS (1995); TEUBNER (1992, 1996); for further reading, see SEINECKE (2015) 58–65, and SEINECKE (2018) 18–19.

7 See again Collin’s and Casagrande’s introduction in this volume.

with ‘legal pluralism’. Since the German nation state was formed as late as in 1871, Germany, in this context, refers to works in the German language or of German speaking scholars. Finally, as this essay resides in the field of history of science, it focusses on jurisprudence, and not on the political and institutional history, nor on the history of applicable law – even though it necessarily takes a sideways glance at German legal and political history. This essay, which, therefore, could also be titled: “Legal pluralism in German language jurisprudence”, tries to show two things. Firstly, on a more methodological plane, it attempts to provide a template for writing a history of legal pluralism *avant la lettre* (II.). Secondly, it tries to rewrite a similar story for German legal thought. Its main thesis is that the traditions of pluralistic legal thought never fully disappeared from German jurisprudence, especially not from German private law. Even though the legal pluralism of the Old Reich perished with the *Heiliges Römisches Reich Deutscher Nation* (Holy Roman Empire of the German Nation) in 1806 (III.), its tradition was never broken. Legal pluralism was subject to manifold debates in the 19th century, but to many more in the 20th century (IV.). One last word of introduction: unfortunately, this story revolves around ‘white men’. Cultural, ethnic, religious diversity in the 19th- and early 20th-century Germany was restricted to different German tribes and territories, like the Saxons or the Bavarians, and to two monotheistic religions, Christianity and Judaism. It would be a challenge to accommodate other ethnicities or cultures into this history for the sake of diversity. The question of gender is, however, different, for women have long been discriminated against in the German territories. As they were not admitted to the legal profession until the first half of the 20th century,⁸ a history of women’s legal thought in Germany almost seems impossible to reconstruct within the 19th-century context; for the 20th century, however, it still would be highly feasible and necessary.

2 Ways to legal pluralism

It is important to acknowledge that as a concept legal pluralism is open and vague. In fact, the need for research into legal pluralism derives from a variety of possibilities for ideas and imagination. For this reason, legal pluralism became a fruitful concept for historiography, anthropology, political

8 See RÖWEKAMP (2011).

science, and legal theory. At the same time, there is no formal consensus on the exact definition of the term. Only simple and more general definitions have gradually gained acceptance, of which the best known comes from Sally Engle Merry in 1988: Legal pluralism “is generally defined as a situation in which two or more legal systems coexist in the same social field”.⁹

This simple definition raises many questions.¹⁰ What does “situation” mean: a conflict or a general order? Is “legal system” a jurisprudential system or just any kind of legal order? Does “coexistence” mean coordinated or competing orders? And where do the boundaries of the “social field” lie? Very early on in the debates on legal pluralism, it was possible to note a “pluralism of legal pluralisms”.¹¹ It revealed itself in infinite definitions and a great diversity of phenomena, such as the various ‘legal orders’ applying to indigenous communities, rival alternative socio-normative orders, soft law, the fragmentation of international law, transnational private law, and many more. This pluralism of legal pluralisms considerably complicates the analysis of legal pluralism. Any definition à la “legal pluralism is ...” now seems arbitrary. Above all, definitions limit the open concept and thus restrict its potentials. For this reason, the reflection of one’s own knowledge-interest is central to the search for a concept of legal pluralism.

In order to trace the history of legal pluralism in German legal thought since 1800, at least three approaches seem possible. They all use legal pluralism as a ‘research term’, and not as a ‘source term’; however, it is important to emphasize at the outset that legal pluralism is not an empirical phenomenon, like a table, a house, or even law, for “a variety of factors produce the perception of legal pluralism”.¹² The use of the term particularly depends on the normative bias of the describing subject.¹³ Many social orders can exemplify ‘legal pluralism’ – or not: indigenous legal orders either testify to legal pluralism or are seen as non-legal customs of so-called ‘savages’; alternative socio-normative orders within the state constitute legal pluralism or are condemned as illegal parallel orders; the various institutions and dispute

9 MERRY (1988) 870.

10 For this SEINECKE (2015) 14–20.

11 E. g. BENDA-BECKMANN (1994) 12; TAMANAHA (2001) 173; for a typology see SEINECKE (2015) 27–49.

12 DAVIES (2010) 809.

13 See SEINECKE (2018) 15.

settlement mechanisms in international law are examples of legal pluralism or can be seen as fragments of the broken unity of international law; transnational private law can confirm legal pluralism or can refer to a simple set of treaties based on state norms and state enforcement. Far from being a value-free term, ‘legal pluralism’ is always susceptible to ideology, as its use is highly dependent on political, moral or scientific preferences.

A first possible way to access legal pluralism is through attention to the diversity of the law or of the legal issues. Analytically at least, five legal pluralisms can be distinguished: conflicts in substantive law, competing legal institutions or jurisdictions, coexisting legal and non-legal orders, the different origin of laws, and, finally, different *nomoi*, worldviews or ideologies in law.¹⁴ Each of these levels is based on the analysis of an empirical socio-normative or legal order.

A second way to apprehend legal pluralism is by envisioning its ideological potential. The concept can be approached through the spectrum of its “interaction” and “*nomos*”:¹⁵ “Legal pluralism is the interaction between a first, dominant legal order and a second, alternative legal order: legal pluralism is the *nomos* of *nomoi*.”¹⁶

This approach to legal pluralism is based on a double-sided concept of law. It divides law into two spheres, one strictly doctrinal or practical and the other more cultural or ideological. Both act in concert to form a legal order, for example when indeterminate legal terms are (re-)defined with respect to social or moral expectations. The question of legal pluralism then must be raised on the cultural plane. On this second legal layer, competing ideologies manage to permeate the legal domain and become the law – and that is where one can observe legal pluralism.

Both approaches, however, are of little help in the search for ‘traditions of pluralistic legal thought’. They analyze empirical phenomena and ascribe different legal pluralisms to them – or not. They do not help with writing a history of jurisprudence. A history of legal pluralism in legal thought, in contrast, needs to focus on the scientific use of the term. Therefore, a third approach seems more promising. It draws on early debates on legal plural-

14 More detailed SEINECKE (2017) 217–219.

15 See SEINECKE (2015) 362–373; SEINECKE (2017) 218–219; for the concept of “*nomos*” COVER (1983).

16 SEINECKE (2015) 362.

ism, in order to reconstruct the concept. It subsequently examines the use of the term ‘legal pluralism’ in legal anthropology in the 1970s and 1980s as well as in political and legal theory in the late 1980s and 1990s.¹⁷ Four common characteristics can be identified in the early usage of the word ‘legal pluralism’ between the 1970s and 1990s: (1.) law without a state, (2.) alternative law, (3.) interlegality, and (4.) nomos. These four characteristics should not be misunderstood as comprising a definition when, in fact, they represent “family similarities” in the usage of the word ‘legal pluralism’.¹⁸ And their influence in the history of German legal thought can now be researched – even though the term ‘legal pluralism’ was born only in the second half of the 20th century.

2.1 Law without a state

The polemical battle cry of legal pluralism is “law without a state”.¹⁹ Almost all debates on legal pluralism are about non-state law. But non-state law can mean a lot. As a non-political law, it is related to grown social laws. As a non-statutory law, it refers to oral legal cultures or legal customs.²⁰ As a non-institutionalized law, it takes informal social practices seriously in normative terms. As a non-differentiated law, it is close or identical to religious, moral or ethical norms. As a non-state enforceable law, it remains at a distance from the state’s monopoly of force, i. e., its courts and official enforcement of law. As a non-public law, it must rely on private lawmaking and autonomous legal spaces.

This diversity of non-state laws underpins the notion of ‘law without a state’. The prevalence of legal pluralism is usually assumed in areas where the state is deemed not fully developed or not strong enough, and it does not fully control legislation and enforcement processes. This applies to indigenous legal orders as well as to parallel societies or international public and private law. ‘Law without a state’ always is more bottom-up than top-down. It is always more private or social than public or sovereign.

17 See SEINECKE (2015) 20–27.

18 See WITGENSTEIN (1984 [1953]), §§ 67, 43.

19 See SEINECKE (2015) 20–22.

20 See SEINECKE (2018).

2.2 Alternative law

Debates on legal pluralism are rarely solely negative. The dictum ‘law without a state’ already refers to a second, alternative law. This other law is as diverse as non-state law and can refer to many forms of (alternative) orders and legalities: legal customs, particular or territorial statutes and common law, municipal, land or imperial statutes, Roman or Canon law, natural or rational law, customary law or *Juristenrecht* (lawyer’s law), indigenous or religious, inter- or transnational, or social or global legal orders. There is a wide range of alternative laws.

The many names of alternative law not only describe other ideas of substantive law. They also argue about fundamentally different concepts of law. The oral and local signature of legal customs and practices can hardly be compared to modern state law and its justice. The salvation of the soul that always is at stake in religious law has no equivalent in secular legal orders. The ethical and moral dimension of natural law cannot be translated into a liberal and positive law. Alternative law often is about a true alternative to ‘modern’ law, meaning that phenomena, notions, and ideas that go by the term ‘law’ would probably not be conceived as ‘law’ from a ‘modern’ point of view.

2.3 Interlegality

The most challenging concept from the early debates on legal pluralism is “interlegality”.²¹ It links official and alternative law, state law and non-state law, or even more radically, all kinds of laws and legal orders. Interlegality is at odds with modern legal thought and its rationality. Lawyers seek decisions and clear solutions; they try to cope with diversity and not conjure it up. Interlegality, on the other hand, is the exact opposite. The term describes the intricate interplay of different laws, socio-legal orders or ‘legalities’. Boaventura de Sousa Santos introduced this concept as the “phenomenological counterpart of legal pluralism”:

“We live in a time of porous legality or of legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is by interlegality. [...]”

21 It was introduced by SANTOS (1987) 298.

Interlegality is a highly dynamic process because the different legal spaces are non-synchronic and thus result in uneven and unstable mixings of legal codes (codes in a semiotic sense).²²

From an analytical perspective, there are two interlegalities: social and legal interlegality. Social interlegality describes the interaction of official law – normally a state law – and a social order. It focuses on the subject of action in normative complex situations. People are repeatedly exposed to contradictory normative requirements, for example when family loyalties are challenged by legal obligations or when economic constraints give rise to a disavowal of legal rules.²³

As soon as social orders are recognized as legal, social interlegality is transformed into legal interlegality. In legal doctrine, interlegality is a common phenomenon. The search for legal unity has produced numerous mechanisms to deal with it. The doctrine of the sources of law organizes various legal sources, like statutes, doctrine and customs, in a hierarchy. Thus, according to the so-called *Statutenlehre* (theory of statutes) of the Old Reich, statutes took precedence over common law. Methodology knows numerous rules of precedence such as *lex posterior derogat lex priori*, *lex specialis derogat legi generalis* or *lex superior derogat legi inferiori*. In conflict of laws, certain points of reference decide on the applicable law. Finally, concepts of legal autonomy grant legislative powers to social groups. Thus, interlegality is able to express the negotiated relationship between official and alternative law in one term. It is, therefore, a key feature of legal pluralism.

2.4 Nomos

The first three characteristics, i. e., law without a state, alternative law and interlegality, are almost obviously related to legal pluralism. The fourth feature, “nomos”, is not evident on the surface of the texts. This fascinating concept was introduced to legal theory by Robert Cover, and it is also closely linked to an intriguing concept of legal pluralism:²⁴

“We inhabit a nomos – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. [...] No set of

22 SANTOS (1987), emphasized in the original.

23 For an economical motivated legal pluralism, see the famous study of MOORE (1973).

24 On the legal pluralism of Robert Cover, see SEINECKE (2015) 260–281.

legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”²⁵

Nomos points to all kinds of normative narratives, ideas and theories that give ‘meaning’ to texts and the law. It is not restricted to ideologies or worldviews. It rather includes structures that influence the understanding of the legal world – from political ideas to scientific premises.

Important for the concept of legal pluralism is now that the early debates on it all were driven by a political, ideological, or scientific agenda. In legal anthropology, legal pluralism came into its own alongside other agendas, like the political recognition of indigenous rights and legal orders.²⁶ Aside from his research on legal pluralism, Boaventura de Sousa Santos also vigorously advocated and influenced global left-wing politics.²⁷ In the same way, Teubner’s search for ‘law without a state’ was underpinned by his own state-critical attitude and a set of scientific presumptions. This nomological and ideologically critical dimension often explains the call for alternative law and legal pluralism. That makes it one of the central issues in discussions on legal pluralism.

3 Legal pluralism in the Old Reich and legal unity in the German nation state

At the beginning of the 19th century, there was a fundamental political and legal change in the German language and culture arena. In 1806, the dissolution of the Holy Roman Empire of the German Nation brought forth numerous sovereign states. It was not until 1871 that the German Reich was founded. These changes had considerable consequences for the constitution of the law and for legal thought. Old institutions such as the *Reichskammergericht* (Imperial Chamber Court) in Wetzlar, the *Reichshofrat* (Aulic Council) in Vienna or the *Reichstag* (Imperial Diet) in Regensburg had perished with the Reich in 1806. After 1871, however, new institutions were intro-

25 COVER (1983) 4–5, emphasized in the original.

26 See SEINECKE (2015) 61–62.

27 See SEINECKE (2015) 209–211, 218–223.

duced such as the *Reichsgericht* (Imperial Court of Justice), the *Reichskanzler* (Chancellor), and the *Reichstag* (Parliament).

3.1 Legal pluralism in the Old Reich

In the Old Reich, there was a great diversity of legal pluralisms. Among them were pluralisms of legal sources and substantial law, of legal institutions and the genesis of law, as well as the relationship between law and non-law and a ‘nomos of nomoi’, i. e., competing legal ideologies. All five analytically distinguishable legal pluralisms can be found in the legal epoch of the Old Reich.

A simple and vivid example of the pluralism of legal sources in the Old Reich is provided by the *Reichskammergerichtsordnung* of 1495 (statute of the Imperial Chamber Court). Article 3 stated the official oath of the judges and assessors, who

“should be faithful to our Imperial Chamber Court, and to be diligent, and to judge by the common laws of the Reich, and also by the honest, honorable, and reasonable orders, statutes, and customs of the principalities, reigns, and courts, which are brought before them, to judge according to their best understanding as to the high and to the low, and not to be moved by anything else.”²⁸

In this oath, the common laws, i. e., the scholarly Roman and Canon law, were treated on par with the particular or territorial orders, statutes, and customs. No source was backed by a higher law or afforded greater dignity. They all gave guidelines for judicial action. The words used shed light on one important aspect: Only the common laws are called ‘law’ at this point. The other normativities lack this attribute. They are just orders, not legal orders, mere statutes, not legal statutes and simple customs, not legal customs – and they had to be proven in front the court. Only if there was evidence for them, could they be applied.

A second example represents the institutional and jurisdictional legal pluralism in the late phase of the Old Reich. In an essay from 2007, Anja Amend reports on a legal dispute over the guarantee of a Frankfurt-based merchant.²⁹ The merchant refused payment and won the dispute with his creditor before the Frankfurt *Schöffengericht* (lay judges court). Both went on

28 SCHMAUSS/SENCKENBERG (eds.) (1747) 7; more easily accessible in BUSCHMANN (1994) 176.

29 AMEND (2007).

to appeal to different higher courts. The merchant “filed a defamation suit with the Imperial Chamber Court”, while the creditor “appealed to the Aulic Council because of his defeat with a reconvention suit”.³⁰ This gave rise to the problem of legal pluralism: For both courts adjudicated differently. One judged in favor of the merchant, whereas the other did not. The city of Frankfurt now faced a fundamental legal question: How should the city act? Which judgement should be enforced? Should the city follow the Imperial Chamber Court or the Aulic Council? The city reacted in a simple manner. Enforcement was suspended and nothing happened. In a letter from 1791, the city of Frankfurt explained its reaction:

“Since We are willing to live up to the decrees of both supreme courts of the Reich, which are equally respectable to Us, [...] but at the same time do not see a chance to follow the conflicting commands, and at the same time find no instruction in an imperial statute, that tells us, which supreme court we should follow, if both their commands override each other, We thought it advisable, in order to evade further consequences of this jurisdiction conflict, to look for a settlement between the litigants.”³¹

The Frankfurt city authorities saw themselves in a jurisdictional dilemma. They had no competence to resolve the jurisdictional conflict between both imperial supreme courts. Therefore, they preferred “to leave everything in status quo” and consult the Caesar for a decision. Regardless of the legal difficulties, the case offers a striking example of the institutional legal pluralism in the Old Reich.

3.2 Legal unity in the German nation state

After the foundation of the German Reich in 1871, most forms of the old legal pluralisms were lost. Pluralism of legal sources and of substantial laws had to give way to the unity of German private law. Institutional legal pluralism was abolished by clearly defined jurisdictions. The distinction between the legal and other social systems, i. e., between law and non-law, became ever more established and professionalized. In ideological terms, German private law turned into national law and state law. Traces of the old legal pluralism only could be found in the genesis of the *Bürgerliches Gesetzbuch* (German Civil Code, BGB).

30 AMEND (2007) 8.

31 AMEND (2007) 7.

This new unity of German private law was established by positive law. The so-called “codification principle” eliminated the pluralism of legal sources and substantial law.³² Article 55 of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Act to the German Civil Code, EGBGB) from 1896/1900 stated decidedly: “The private law provisions of the federal states shall cease to have effect unless otherwise provided in the Civil Code or in this Act.”

This was meant to be comprehensive and conclusive. In contrast to the private law of the Reich, which in principle remained “in force” (article 32), the diverse private laws of all the federal states lost their validity. Most importantly, “federal state laws” did not only mean statutes, for according to article 2, they meant “every legal norm”, and this had extensive consequences for the legal sources of German private law. Gottlieb Planck soberly described this fundamental change in 1901:

“According to art. 2, federal state laws are to be understood as all legal norms from the federal states, whether they are based on law, an ordinance, a decree of a competent authority, or on customary law. One can also express this negatively in the sense that all legal norms which are not based on imperial laws are to be regarded as federal state law. In particular, common law also belongs here. This did not become law by an act of the legislation of the individual states or by particular customary law, but on the basis of a general German customary law and was recognized as such by laws of the former German Reich. But in the sense of art. 55, it nevertheless belongs to the federal state laws, because it is not based on a law of the present German Reich.”³³

Thus, the old substantial legal pluralism and pluralism of legal sources was passé. With a stroke of the pen of the legislator, entire legal worlds were rendered waste.

This substantial unity in German private law was accompanied by an institutional one. Prima facie the “judicial sovereignty of the individual states” was preserved.³⁴ However, the “judicial unity” was the responsibility of the Imperial Court of Justice.³⁵ Above all, there were no alternatives to state courts anymore. According to article 15 of the *Gerichtsverfassungsgesetz* (Court Constitution Act) from 1877:

32 PLANCK (1901) Preliminary remark 1 on the third section of the EGBGB, 130.

33 PLANCK (1901) Art. 55 EGBGB, remark 3; my translation.

34 See KERN (1954) 97, 99.

35 See KERN (1954) 98.

“The courts are state courts.

Private jurisdiction is abolished; it is replaced by the jurisdiction of the federal state in which it was exercised. [...]

The exercise of religious jurisdiction in secular matters has no civil effect. This applies in particular to matrimonial matters and matters of betrothal.”

The unity of private law was preceded by the unity of state jurisdiction. The institutional legal pluralism of the older times was replaced by the “state courts” of the new German Reich.

4 Legal pluralism in German legal thought

The concept of legal pluralism developed here, along with a brief reflection on the fundamental political changes of 1806 and 1871, are pivotal to reimagining the history of legal pluralism in German legal thought. This brief history, however, represents more a ‘patchwork story’ than a coherent narrative. It brings together three traditions from German jurisprudence: (1.) the famous debates from 19th-century legal history between Savigny and Thibaut, Beseler and Puchta,³⁶ as well as Gierke and the German Civil Code, (2.) the two most famous positions from German legal positivism, namely of Hans Kelsen and Gustav Radbruch, and (3.) the more recent traditions of German legal sociology and anthropology, as represented by the writings of Eugen Ehrlich, Franz von Benda-Beckmann, and Gunther Teubner.

4.1 Friedrich Carl von Savigny and Anton Friedrich Justus Thibaut

After the defeat of Napoleon in October 1813, in June 1814, Anton Friedrich Justus Thibaut (1772–1840) completed a short paper titled “Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland” (On the necessity of a general civil law for Germany). The upcoming restoration was not yet a definite outcome. The Congress of Vienna was not slated to begin until September 1814. When Thibaut finished his essay, the future of the German sovereign states still appeared undecided.

36 For a discussion on Georg Friedrich Puchta (1798–1846) and Georg Beseler (1809–1888), see SEINECKE (2020) 295–308.

Even as Thibaut pleaded for the formation of “Germany” in this political situation,³⁷ the “exaggerated demand” for “unconditional unity” was not a matter of concern for him.³⁸ On the contrary, the “wealth of the manifold” guaranteed “Germans always an excellent place among the peoples,”³⁹ while “everything could easily sink to platitude and dullness if the omnipotent hand of a single person were able to bring the German peoples to a full political unity.”⁴⁰ For the time being, Thibaut hoped only for legal unity:

“I, on the other hand, am of the opinion that our civil law (by which I shall here always mean private and criminal law, and the process) must be changed completely and quickly, and that the Germans cannot be happy in their civil relations in any other way than if all the German governments, by joining forces, contribute to the creation of a code of law that is enacted for the whole of Germany and remains distinct from the will of the individual governments.”⁴¹

Four months later, in October 1814, Friedrich Carl von Savigny (1779–1860) replied to this demand with the famed book, “Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft” (On the vocation of our age for legislation and jurisprudence), regarded as the manifesto of the *Historische Rechtsschule* (Historical School of Jurisprudence). Savigny’s plea was clear: legal unity should be established through jurisprudence, not by legislation – especially not as early as 1814. With Thibaut in mind, he wrote:

“On this purpose we agree: we want the foundation of a secure right, secure against arbitrary intervention and unjust attitudes; likewise, community of the nation and concentration of its scientific aspirations on the same object. For this purpose, you demand a code of law, but this would only produce the desired unity for half of Germany, while the other half would separate more sharply than before. I see the right means in an organically progressive jurisprudence that can be common to the whole nation.

We also agree in the evaluation of the present condition, because we both recognize it as deficient. But you see the cause of the evil in the sources of law, and you believe that you can help by a civil code: I find it rather in us and believe that we are not called to a civil code just because of that.”⁴²

37 THIBAUT (1959 [1814]) 5; all quotes from this work are my translation.

38 THIBAUT (1959 [1814]) 7.

39 THIBAUT (1959 [1814]) 8–9.

40 THIBAUT (1959 [1814]) 9.

41 THIBAUT (1959 [1814]) 12.

42 SAVIGNY (2000 [1814]) 161; all quotes from this work are my translation.

This debate between Thibaut and Savigny gained worldwide attention.⁴³ In Germany, legal historians called it *Kodifikationsstreit* (codification controversy), whereby Thibaut is regarded as the defender of codification and Savigny as its opponent. Thibaut demanded a new code of law, Savigny a new jurisprudence and lawyers trained in history and science. In the end, Savigny was generally proclaimed the “winner”, but this image has been put into perspective by recent research.⁴⁴ In the first half of the 19th century, however, the Historical School, which was decisively influenced by Savigny and gained enormous influence over German jurisprudence.⁴⁵ Its program for a new historical jurisprudence attracted many followers. Nevertheless, Savigny, like Thibaut, had to contend with a profusion of legislation emanating from the many sovereign states after 1815.

Thibaut and Savigny were not alone in the discussion about legal unity and codification. Many more voices took an independent stand and many revisited their writings.⁴⁶ Between the end of the Old Reich in 1806 and Napoleon’s Waterloo in 1815, German lawyers struggled to find solutions to reconcile territorial statutes and common law, legal diversity and national law, and German lands and the German nation,⁴⁷ which led to the debate on legal pluralism and legal unity in Germany.

4.1.1 *Law without a state*

In this debate, both Thibaut and Savigny advocated for a private law without a state. Savigny was not alone in his awareness of the political impossibility of a German nation state, for Thibaut was also cautious about how the “future political conditions” would shape the course.⁴⁸ That is why the code could not have emanated from the state or, more precisely, from a nation state. Nevertheless, Thibaut permitted state influences on the code, for it should have been the task of a “patriotic association of all German govern-

43 For the international reception of Savigny and his “Beruf” RÜCKERT/DUVE (eds.) (2015) and MEDER/MECKE (eds.) (2016).

44 See SCHÖLER (2004) 86–131; very clear RÜCKERT (2012) 1930: “There’s a lot wrong with that”.

45 See HAFERKAMP (2018).

46 See SCHÖLER (2004) 88–106, 113–123.

47 See DÖLEMEYER (1982) 1421–1439.

48 THIBAUT (1959 [1814]) 10.

ments”⁴⁹ to establish “an equal civil constitution for eternal times”.⁵⁰ In the legislation he demanded “collegial negotiations” and “the unification of many from all countries”.⁵¹ For Thibaut, only such a community could have guaranteed “complete freedom of the voices” and “universality of consideration”.⁵² Furthermore, the code needed the “solemn guarantee of the great foreign allied powers” “like an international treaty”.⁵³

On the other hand, Savigny left no room for the state to make substantive private law. This was different only for procedural law and legal institutions. His private law was jurisprudence, namely an “organically progressive jurisprudence which can be common to the whole nation”.⁵⁴

4.1.2 Alternative law

These differences continue owing to their different expectations of alternative law. Thibaut demanded a uniform, “general”, “civil”, and national code of law for substantive civil and criminal law as well as the process.⁵⁵ He contrasted this code with the manifold laws derived from the “Old German Codes”, the “native Particular Laws”, the old “Reich Laws”, the “received foreign codes, the Canonical and Roman laws”.⁵⁶

For Savigny, on the other hand, legislation should not establish law. He advocated a totally different idea of the origin of law:

“The sum of this view, then, is that all law arises in the way which the dominant, not entirely appropriate use of language calls customary law, i.e., that it is first produced by custom and popular belief, then by jurisprudence, everywhere, that is, by internal forces that are still operating, not by the arbitrariness of a legislator.”⁵⁷

That is why Savigny investigated history and Roman law: He believed that law would be found in its original state there, free from commentaries and

49 THIBAUT (1959 [1814]) 24.

50 THIBAUT (1959 [1814]) 24.

51 THIBAUT (1959 [1814]) 40–41.

52 THIBAUT (1959 [1814]) 40.

53 THIBAUT (1959 [1814]) 41.

54 SAVIGNY (2000 [1814]) 161.

55 THIBAUT (1959 [1814]) 59, 12.

56 THIBAUT (1959 [1814]) 13–14.

57 SAVIGNY (2000 [1814]) 14.

glosses, from reception and reform. He sought the politically or historically genuine and therefore more authentic and better law.

For Savigny, the desirable “state of civil law” was dependent on “three pieces”: “first of all a sufficient source of law, then a reliable staff, finally a functional form of the process”.⁵⁸ While he left the domain of the process to sovereigns and legislation, e. g. “in the form of provisional orders or instructions to the courts” or by “recording customary law”,⁵⁹ it was only lawyers with scientific training, i. e., those systemically and historically informed, who could guarantee the correct handling of the historical sources.⁶⁰ This class of lawyers was an integral part of his idea of an alternative private law.

4.1.3 *Interlegality*

The differences in their concept of law also explain the differences in their understanding of interlegality. Thibaut discredited the old legal pluralism of the “territorial statutes” as “chaotic” and an “endless jumble”.⁶¹ “The rampant local customs and habits are only too often mere legal laziness”.⁶² Moreover, the territorial laws were “so incomplete and empty” that they alone could not be relied on to carry a decision. Again and again, they needed the “received foreign law books”.⁶³ Above all he called the “Roman code” a “mismatched work”⁶⁴ and even the “wisdom of the classics” did not help, “since now the whole thing [...] was a truly ghastly mixture of clever and great, consequent and inconsistent provisions”.⁶⁵ It is this legal pluralism that he did not want. That is why he pleaded for a new uniform codification.

On the other hand, Savigny held on to the sources of law of the Old Reich. His skepticism about a new national codification and his hope for a new historical jurisprudence left him with no other choice. Under the head-

58 SAVIGNY (2000 [1814]) 111.

59 SAVIGNY (2000 [1814]) 132.

60 See HAERKAMP (2018) 31–110.

61 THIBAUT (1959 [1814]) 14.

62 THIBAUT (1959 [1814]) 60.

63 THIBAUT (1959 [1814]) 14.

64 THIBAUT (1959 [1814]) 15.

65 THIBAUT (1959 [1814]) 19.

ing, “What we should do where there are no codes”, he explicitly acknowledged the interlegality of the Old Reich:

“As far as the source of law is concerned [...], I am convinced that its reintroduction in the place of the [French] Code [Civil], or its retention where the Code did not apply, would be the same combination of common law and the territorial laws that had previously prevailed throughout Germany: I consider this source of law to be sufficient, indeed excellent, as soon as jurisprudence determines what its duty is and what can be done only by it.”⁶⁶

This commitment to the old pluralism of legal sources was only consistent. The problems posed by the old legal pluralism should have been solved by an academic legal professional. He vigorously opposed the “indescribable violence” of the “idea of uniformity” with a view to the “great diversity of territorial laws”.⁶⁷

“That is why it is a mistake to believe that the general will gain life through the destruction of all individual circumstances. If in every state, in every city, even in every village, an idiosyncratic self-confidence could be generated, the whole would also gain new strength from this increased and multiplied individual life.”⁶⁸

4.1.4 *Nomos*

In this passage, Savigny also combined his idea of law with his ideological claim and his idea of the German nation:

“Therefore, when the influence of civil law is mentioned, the particular law of individual territories and cities must not be regarded as disadvantageous. The civil law deserves praise in this respect, insofar as it influences or is capable of influencing the feelings and consciousness of the people [...]. Yes, for this political purpose, no state of civil law seems more favorable than that which was formerly common in Germany: great diversity and idiosyncrasy in terms of detail, but with the common law as the basis everywhere, which always reminded all German tribes of their indissoluble unity.”⁶⁹

Germany between diversity and unity – this was Savigny’s idea for German private law. Thibaut chose a different route. His notion of unity reiterated the idea of the German nation, but did not accommodate the diversity of

66 SAVIGNY (2000 [1814]) 111–112.

67 SAVIGNY (2000 [1814]) 41–42.

68 SAVIGNY (2000 [1814]) 42.

69 SAVIGNY (2000 [1814]) 42–43.

German peoples: “But the same laws produce the same customs and habits, and this equality has always had a magical influence on peoples’ love and loyalty”.⁷⁰ It was precisely for this reason that Thibaut demanded a general German civil code. Such a code “from all national power” would unite the German people even more deeply.⁷¹

4.1.5 Conclusion

The legal ideas proposed by Savigny and Thibaut represented two different paths to German nation building. For Savigny, law emanated from the people and from customs, which meant that the nation had to also grow ‘from below’. It was the great task of academic jurisprudence to trace the national law back to its Roman roots and the people’s spirit – completely different for Thibaut, for whom law is decreed ‘from above’, in a way that it shapes customs and habits as well as the feeling for the nation.

Thibaut and Savigny, however, both demanded a law without a state. One as the task of national legislation, in 1814 this had to be supra-state legislation, the other as a challenge for jurisprudence. For one, this meant a codification and for the other, the old interlegality of the Reich with new historically and systematically trained lawyers. Despite these differences, they cherished the same dream: the hope for the German nation.

4.2 Otto von Gierke and the German civil code

One of the loudest voices on the way to German legal unity was of Otto von Gierke (1841–1921),⁷² who accompanied the drafts for the new German Civil Code as a sharp critic. Above all, he criticized the individualistic and Roman spirit of the new codification.⁷³ His slogan of the “drop of socialist oil”, which should “seep through” private law, is still a dictum today.⁷⁴

Gierke is a key figure in the search for legal pluralism in German jurisprudence. He wrote his treatises and lectures, his polemics and critiques in

70 THIBAUT (1959 [1814]) 33.

71 THIBAUT (1959 [1814]) 59.

72 On the different interpretations of Gierke, see DILCHER (2017 [1974/75]) 301–307.

73 See GIERKE (1889b); all quotes from Gierke’s works referenced here are my translation.

74 GIERKE (1889a) 13.

the “delayed saddle time” of German jurisprudence.⁷⁵ Gierke was a child of the epoch between the Old Reich and the new German Reich. He studied in Berlin and Heidelberg in the late 1850s and participated in the German-German War of 1866 as well as in the Franco-German War of 1870/71.⁷⁶ The first volume of his *Das deutsche Genossenschaftsrecht* (The German Cooperative Law) was completed in 1868, only a few years before the foundation of the German Reich. His *Deutsches Privatrecht* (German Private Law) appeared in the first volume in 1895, one year before the German Civil Code was passed. Gierke knew the old legal world just as well as he saw the new one rise.

4.2.1 *Law without a state*

Gierke gave no simple answer to the question of ‘law without a state’. On the one hand, Gierke focused on the wealth of “human associations”, e. g. “religious communities, estates, professional classes”, “tribes or territorial groups”.⁷⁷ For him, they were all “capable of producing law”.⁷⁸ On the other hand, he assigned the state a privileged role for justice:

“The organized community is capable of generating justice to an increased degree: above all the state as an organized national community; but also the church, the community, every cooperative.”⁷⁹

As soon as Gierke granted the state increased legal power, he again restricted it with regard to “every cooperative”. His preference for state law is obvious in many passages of his German Private Law. He regarded the “life of law” as “most intimately interwoven with the life of the state”⁸⁰ and, in addition, he gave state law a “superior position” in comparison to the “law set by any other association”.⁸¹

There were various reasons for his ambivalence toward law with or without the state. The dominance of state law followed “the circumstances of the

75 For this assumption of a “delayed saddle time” see SEINECKE (2020) 274–275.

76 For Gierke’s biographical data see DILCHER (2012); BADER (1964).

77 GIERKE (1895) 119–120.

78 GIERKE (1895) 119–120.

79 GIERKE (1895) 120.

80 GIERKE (1895) 122.

81 GIERKE (1895) 127.

present”.⁸² It also corresponded to Gierke’s national political worldview.⁸³ At the same time, as a legal historian, Gierke was very familiar with the history of law without a state.⁸⁴ And as a private law scholar, he, of course, defended non-state law:

“In our century, autonomy has suffered many further losses, but at the same time it has conquered new areas of power with the rejuvenation of the corporate system. Of course, it can never regain its medieval significance in the modern state, even from afar, and the least it can do in private law is to reassume its old role. But in its changed forms, it continues to represent a lively creative force even today. More and more, jurisprudence has restored the concept of autonomy without, of course, always acknowledging its full scope. Autonomy is therefore recognised in modern German private law as an independent and peculiar source of law.”⁸⁵

This ambivalence between state law and non-state law is also apparent in Gierke’s concept of law and power:

“The law in itself is a power, but only internal, not external power. For its completion, therefore, it requires an organized power, which places itself at its service. This service is above all rendered to him by the state, by ordering the persecution of law [...]. In turn, the law serves the state for this purpose by permeating all its orders and consolidating them by elevating power relations to legal relations. [...] But law and state always remain two independent powers of life. [...] Power is not law: there is power without law. There is also powerless law.”⁸⁶

Gierke’s concept of law was dependent on the state or some social power. But it was not exhausted by it. Both sides, i. e., power or state and law, appear to be dialectically intertwined. Gierke’s legal thinking oscillated between the theory of cooperatives and the reality of the state, between the autonomy of private law and the power of state law.

4.2.2 Alternative law

This ambivalence toward state law also characterizes Gierke’s conception of alternative law. Ontologically, it depended on the living existence of “collective organisms”: “The organic theory regards the state and the other

82 GIERKE (1895) 127.

83 Differentiated on Gierke’s nationalism DILCHER (2017 [1974/75]) 333–334.

84 See GIERKE (1868).

85 GIERKE (1895) 148.

86 GIERKE (1895) 118–119.

associations as social organisms”.⁸⁷ Gierke claimed supra-individual or social entities as “living” or “living beings” just like humans.⁸⁸ And, as social associations, they of course had legal power.

Accordingly, in addition to state law, Gierke distinguished between three further types of law: “autonomous statutes”,⁸⁹ “customary law” and “lawyer’s law”.⁹⁰ Arranged in a simple matrix, laws and statutes hung on different legislation. Laws came from the state, whereas autonomous statutes derived from other associations. Both differed from customary law by the degree to which they were organized in the community. Only organized associations had the power to set law consciously or positively. Gierke’s customary law, on the other hand, depended on traditional categories, i.e., a “practice” (*consuetudo*) and the “formation of a legal opinion” (*opinio iuris*).⁹¹ Finally lawyer’s law was some sort of customary law. It started as “court usage”. Later, through “constant practice”, with the support of “the opinion [...] of its legal validity”, it would become true customary law.⁹²

4.2.3 *Interlegality*

Although Gierke recognized all kinds of law as true law, he was not interested in interlegality. He advocated national legal unity, a term that dominated the historical sections of his German Private Law:

“The rise of the German spirit in the Wars of Liberation also gave new impetus to national legal life. Since then, the nation has been striving for two grand goals in regard to law and in the state: unity and Germanity.”⁹³

Full of pathos, he then recounted the story of the unity of private law:

“Immediately after the extension of its jurisdiction in 1873, however, the German Reich took on the task that had never been solved throughout centuries of German history, of producing a German civil code. Before the century ends, the work will, according to human opinion, be completed and thus unity will also be realized in the main in private law.”⁹⁴

87 GIERKE (1902) 12.

88 GIERKE (1902) 16.

89 See GIERKE (1895) 142.

90 GIERKE (1895) 159, 174.

91 GIERKE (1895) 165–170.

92 GIERKE (1895) 178–179.

93 GIERKE (1895) 22.

94 GIERKE (1895) 23.

This hope for the unity of private law certainly did not blind Gierke to the problem of contradictions in law. The recognition of law, statute and custom as equal law had to lead to a “clash of legal sources”.⁹⁵ However, Gierke dissolved these conflicts not by an interlegal concept of law. He stuck with the tried and tested methods like *lex specialis* or *lex posterior* rule.⁹⁶ For conflicts of territorial law he relied on the doctrines of international private law and the old “Doctrine of Statute”.⁹⁷ The fundamental recognition of foreign law was important here. “Foreign law is law”, Gierke wrote decisively.⁹⁸ In the end, however, he was less concerned with the interaction of laws and statutes, customary and lawyer’s law than with national legal unity.

4.2.4 *Nomos*

Gierke’s belief in legal unity is closely related to his *nomos*. He was driven by a sincere belief in the German nation and participated in the German Wars of Unification as a lieutenant and captain. This is also evident in his scientific work. For Gierke, the nation, like all other communities, could lay claim to an existence of its own and to an independent life. He even experienced this national spirit himself:

“But there are the hours when the community spirit reveals itself to us with elementary power in an almost obvious form and fills and overwhelms our inner being in such a way that we hardly feel our individual existence as such anymore. I lived through a consecrated hour of this kind here in Berlin Unter den Linden on July 15, 1870.”⁹⁹

His critique of the Roman law epitomized this hope for the German nation. He was a great sceptic of the so-called ‘reception’ of Roman law in Germany:

“Because help had to come. And it came. But now it came from the outside. One grasped for foreign law, one took up the Roman laws with its supplements, not because, but although it was a foreign law. One found no other way out. Admittedly, this was now a medicine and a very radical medicine for the previous state of illness. But the medicine contained its poison, which caused new diseases! Especially

95 GIERKE (1895) 183.

96 GIERKE (1895) 183.

97 GIERKE (1895) 210.

98 GIERKE (1895) 212.

99 GIERKE (1902) 24.

since excessive doses were swallowed and soon, out of mere habit, continued to be consumed!”¹⁰⁰

This critique is very important to Gierke’s famous reviews of the draft German Civil Code. Next to that, a second philosophical presumption is central to Gierke’s *nomos*. He believed in communities and cooperatives as such. In 1902, he addressed the students of the University of Leipzig in his famous “Speech at the Rectorate’s inauguration”:

“Also you, my dear fellow students, may permeate yourself with the feeling that you are living members of a living whole. [...] Awaken and cultivate in yourself the awareness that the life of a higher order is taking place in your life at the same time; it is this higher order that carries along the individual, and to which humanity owes its history and its dignity. Recognize what you owe as parts of the whole to the whole and give joyfully to the community what is due to the community!”¹⁰¹

4.2.5 Conclusion

Gierke appears *prima facie* as an early advocate of legal pluralism. The recognition of non-state law as genuine law did not cause him any problems. His concept of law was open to non-state legal orders: the law of the church and all sorts of communities or cooperatives. Nevertheless, Gierke repeatedly tended toward national and state law and gave it a prominent position. Therefore, at second glance, one notes the disappearance of legal pluralism. Gierke lacked a sense for interlegality. His credo was legal unity. Legal conflicts had to be resolved. In principle, only one law was applicable. Legal, political, and state unity were among his central goals. Gierke’s *nomos* was national, which is why he is an important witness for the ambivalent and ‘delayed saddle time’ in German jurisprudence between 1871 and 1900 – between the old legal pluralism and the new unity of private law in Germany.

4.3 Eugen Ehrlich and Hans Kelsen

When Eugen Ehrlich (1862–1922) published his *Grundlegung der Soziologie des Rechts* (Fundamental Principles of the Sociology of Law) in 1913 and

100 GIERKE (1895) 8.

101 GIERKE (1902) 35–36.

Hans Kelsen (1881–1973) reviewed it in 1915, much had changed compared to the political, legal, and scientific situation of the 19th century.¹⁰² Empirical disciplines, such as sociology or psychology, posed new challenges to jurisprudence. At the same time, *Neukantianismus* (Neo-Kantianism) had become prominent in legal philosophy and theory by then. In 1871, the German people gained their delayed nation state, and since 1900, they have their German Civil Code. Democracy, at that time, was no longer just a political dream and it would take only a few more years before it became true in Germany and Austria.

However, Kelsen and Ehrlich did not argue in Germany. Kelsen lived in Vienna and Ehrlich was a professor in Chernivtsi, Bukovina. Their quarrel took place within the borders of the Imperial and Royal monarchy of Austria-Hungary, which perished in 1918. Their old world was swept away after the first great war. No European emperor was to rule an empire after that. The Caesars went into exile or lost their lives. The Reichs became republics.

During this period of radical change, Kelsen and Ehrlich fought over the sense and nonsense of sociology of law. Their dispute is no less well known than the Thibaut-Savigny-controversy. Here Kelsen, the “jurist of the century”, is usually regarded as the “winner”.¹⁰³ Both, however, only discussed the possibilities of legal sociology. In retrospect, they had engaged in a battle on the foundations of legal pluralism. Even today, Eugen Ehrlich is repeatedly stylized as the father of legal pluralism and hardly any lawyer represents the “ideology of legal centralism” more than Hans Kelsen.¹⁰⁴

The center of Kelsen’s legal concept was Vienna. The city in the heart of the Habsburg Empire and later the seat of the Austrian Republic. Ehrlich’s Chernivtsi, on the other hand, lied in the periphery, on the edge of Austria-Hungary. After the end of the Habsburg Monarchy, Chernivtsi, along with the Bukovina, first fell to Romania, then to the Soviet Union – today it

102 This debate only serves as a starting point here and hopefully helps to illustrate the conflicting positions of Eugen Ehrlich and Hans Kelsen on legal pluralism. The following reconstruction is primarily oriented toward EHRlich (1989 [1913]); EHRlich (1975 [1913/1936]); KELSEN (2008 [1934]). Their debate started with KELSEN (1915), followed by EHRlich (1916), KELSEN (1916), finally ending with EHRlich (1916/17) and KELSEN (1916/17). For a deeper reconstruction of the debate, see ROTTLEUTHNER (1984).

103 H. DREIER (1993).

104 See GRIFFITHS (1986) 3, 23–29.

belongs to Western Ukraine. Klaus Lüderssen described the extent of the city's diversity using the example of its buildings:

“One only has to ask about the architecture: in the Chernivtsi of the second half of the 19th century, it condensed great traditions: Oriental-Moorish [...], as well as Roman-Gothic [...], and demonstrates the coexistence of religious groups: the Israelite temple, the Romanian church, the Ukrainian church, the Armenian church, the Orthodox Paraskiva church. In addition, there are the external signs of ethnic orientation: the ‘German House’, the ‘Jewish House’, the ‘Turkish Fountain’, the ‘Russian Lane’, but also the Baroque German Theatre, and contemporary art styles such as the Art Nouveau façades of the Sparkasse [...], professional modern industrial architecture [...] and visions of Galician abandonment.”¹⁰⁵

Of course, architecture also flourished in Vienna. But the political, religious, ethnic, national and legal conditions in Vienna were not as manifold as in Chernivtsi and the Bukovina. The *Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie* (General Civil Code of Austria) of 1812 was closer to Vienna than to Chernivtsi. The city society of Vienna was different from the rural society of the Bukovina, whose customs and habits Ehrlich and the students from his seminar had tried to record. These legal customs were oriented less to the official law of the state than to the practiced traditions. Therefore, Ehrlich became the pioneer of the “Global Bukovina”.¹⁰⁶

4.3.1 Law without a state

Ehrlich relied on society, not on the state. He emphasized this right away in the preface to his *Fundamental Principles of the Sociology of Law*. As a slogan, he postulated: “At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.”¹⁰⁷ Ehrlich's law was societal law. He developed it in a detailed discussion in his “The state and the law”.¹⁰⁸ Like Savigny, he made a strong argument, taking the origin of law as his point of departure – before and beyond the state: “Still more important is the fact that

105 LÜDERSEN (2003) VII–VIII; my translation.

106 See TEUBNER (1996); and below [chapter 4.6].

107 EHRLICH (1975 [1913/1936]) xv.

108 EHRLICH (1975 [1913/1936]) ch.VII, 137–170; on his critique of state legal pluralism SEINECKE (2015) 103–107.

the greater part of legal life goes on in a sphere far removed from the state, the state tribunals, and state law”.¹⁰⁹ He posed this rhetorical question:

“Must these relations wait until they receive mention in a statute before they can become legal relations, in spite of the fact that the basic institutions of our society furnished the order for the affairs of mankind for thousands of years without this aid?”¹¹⁰

From that Ehrlich concluded:

“There are millions of human beings who enter into untold legal relations, and who are fortunate enough never to find it necessary to appeal for aid to a tribunal of any sort. Since the relation which has never come into contact with legislation and judicial adjudication, after all, is the normal relation, it follows that in the very cases that constitute the rule, everything would be lacking that is necessary to determine whether we are dealing with a legal relation or not.”¹¹¹

For Ehrlich, law originated first in customs and in social “associations”.¹¹² This is why, he concluded, law and social normativity lay so close together: “The legal norm is therefore only one of the rules of action and thus related to all other social rules of action.”¹¹³

Ehrlich did not restrict this theory to matters concerning substantive law. He assumed the same for the emergence of courts. They did “not come into being as organs of the state, but of society”.¹¹⁴ Again it was history, where he found non-state justice: “We find the jurisdiction of the head of the clan, of the head of the house, of the elder of the village. We find family courts and village courts.”¹¹⁵ According to Ehrlich, however, this “conversion of the administration of justice into a function of the state”, came far later than the law.¹¹⁶ After this conversion, the courts created “norms for decision”.¹¹⁷ Those were legal norms of a “special kind” and indeed “a rule of conduct, but only for the courts”.¹¹⁸ By that, Ehrlich also explained the *déformation pro-*

109 EHRlich (1975 [1913/1936]) 161–162.

110 EHRlich (1975 [1913/1936]) 162.

111 EHRlich (1975 [1913/1936]).

112 EHRlich (1975 [1913/1936]) ch. II & III, 26–38, 39–60.

113 EHRlich (1975 [1913/1936]) 39.

114 EHRlich (1975 [1913/1936]) 121.

115 EHRlich (1975 [1913/1936]) 140.

116 EHRlich (1975 [1913/1936]) 143.

117 EHRlich (1975 [1913/1936]) 121–136.

118 EHRlich (1975 [1913/1936]) 122–123.

fessionnelle of the legal profession. Through the perpetual orientation toward the law of the courts, the lawyers lost their sense of social law. That deprived the jurisprudence of the fullness of its subject matter and limited it to “the science of the application of the law created by the state”.¹¹⁹

Parallel to this critique of a state-centered concept of law, Ehrlich’s narrative on the emergence of the state continued. To him, the state first emerged only as a “military association” and an “orderly system of taxation”.¹²⁰ Already in its “early period”, it “developed crude police activity”.¹²¹ However, “after a long interval”, the “administration of justice” and “much later [...] legislation” accompanied the functions of the state, until a “true administration by the state [...] did not arise until the seventeenth century in France”.¹²² Ehrlich, thus, once again, underscored the contingent relationship between state and law. For Ehrlich – like Gierke – the state was only one association among many, a “social association”.¹²³

Hans Kelsen intensely contradicted this understanding of law and state. He rejected any kind of “dualism” in theory.¹²⁴ For him, the scientific distinction between law and state only fulfilled an “ideological function”,¹²⁵ namely the “legitimization of the state by law”.¹²⁶ For Kelsen, law and state were one: “All law is state law”.¹²⁷ He called this the “identity of law and state”.¹²⁸ “The state is a legal order. But not every legal order is already called a state [...]. The legal order is called the state when it has reached a certain degree of centralization.”¹²⁹

Kelsen did not analyze the concepts of law and state in their historicity. His epistemological interest was committed to a purely positive, objective

119 EHRlich (1975 [1913/1936]) 19.

120 EHRlich (1975 [1913/1936]) 138.

121 EHRlich (1975 [1913/1936]) 138.

122 EHRlich (1975 [1913/1936]) 139.

123 EHRlich (1975 [1913/1936]) 42.

124 See Kelsen (2008 [1934]) 115–117, 127–128; all quotes from Kelsen’s works referenced here are my translation.

125 Kelsen (2008 [1934]) 116.

126 Kelsen (2008 [1934]) 128.

127 Kelsen (1984 [1911]) X.

128 Kelsen (2008 [1934]) 117–128.

129 Kelsen (2008 [1934]) 117–118.

and “ideology-free”¹³⁰ jurisprudence. Kelsen’s “‘pure’ doctrine of law” aimed to “liberate jurisprudence from all foreign elements”.¹³¹ He offered this polemical analysis:

“In a completely uncritical way, jurisprudence has merged with psychology and biology, with ethics and theology. Today there is almost no particular discipline left that a jurist would not penetrate even though he is not competent in it. Yes, he believes he can enhance his scientific reputation by borrowing from other disciplines. However, the actual jurisprudence is lost.”¹³²

Kelsen’s radical ideas on law and state did not come from ignorance.¹³³ They followed consequently from his pure methodical conception of jurisprudence.

4.3.2 *Alternative law*

For this very reason, Kelsen did not leave open the possibility of an alternative law. His “pure jurisprudence is a theory of positive law”, i. e., a theory of valid or applicable law, not of a hoped-for law.¹³⁴ Even if law was available to politics, it always was a law without legal alternatives. As soon as alternative law was implemented through political will or by judges, it no longer was an alternative but a positive and valid law. For Kelsen, there either was the law or there was no law.

Epistemological pureness and legal positivism forced Kelsen to presume the unity of the legal system. In the first sentences of his chapter, *Die Rechtsordnung und ihr Stufenbau* (The Legal Order and its Stepped Structure), under the first subheading *Die Ordnung als Normensystem* (The Order as System of Norms), he wrote:¹³⁵

“Law as order or the legal order is a system of rules of law. And the first question that needs to be answered here is the one posed by pure jurisprudence in the following way: What constitutes the unity of a variety of legal norms, why does a certain legal norm belong to a certain legal order?”¹³⁶

130 Kelsen (2008 [1934]) 117.

131 Kelsen (2008 [1934]) 1.

132 Kelsen (2008 [1934]) 1–2.

133 Kelsen was well informed, see e. g. Kelsen (1922) 4–74.

134 Kelsen (2008 [1934]) 1.

135 See Kelsen (2008 [1934]) 73–89.

136 Kelsen (2008 [1934]) 62.

Like so much else, Kelsen presupposed the question of legal unity.¹³⁷ And whoever asks for unity will find unity. Kelsen then spelled out the logic of his question starting with state enforcement acts, then proceeding to judicial decisions and the laws determining them, and not least the constitution. Behind the constitution he postulated the notorious “basic norm” as a “condition of all law-making”, as being “not set, but [...] presupposed”.¹³⁸

This positive-normative and state-centered legal order was totally alien to Ehrlich. His law was a law without a state, a law without courts, a law without coercion:

“Three elements, therefore, must, under all circumstances, be excluded from the concept of law as a compulsory order maintained by the state – a concept to which the traditional juristic science has clung tenaciously in substance, though not always in form. It is not an essential element of the concept of law that it be created by the state, nor that it constitutes the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision. A fourth element remains, and that will have to be the point of departure, i. e., the law is an ordering.”¹³⁹

This turn toward normality and “ordering” twisted Kelsen’s perspective 180 degrees.¹⁴⁰ Ehrlich’s law was “living law”, which “constitutes the foundation of the legal order of human society”.¹⁴¹ He preferred “customary law” to the lawyer’s law and the statutory law, thereby contrasting the “law of life” with the “legal rule”, or the “organizational form” with the “decision-making norm”.¹⁴² But Ehrlich did not romanticize the ‘living law’ at all; instead, he understood it sociologically and empirically:

“This then is the living law in contradistinction to that which is being enforced in the courts and other tribunals. The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages, and of all associations, not only of those

137 On the numerous prepositions in Kelsen’s theory SEINECKE (2015) 127.

138 KELSEN (2008 [1934]) 66–67; on the basic norm H. DREIER (1990) 27–90.

139 EHRLICH (1975 [1913/1936]) 23–24.

140 See on the other hand KELSEN (2008 [1934]) 25–28.

141 EHRLICH (1975 [1913/1936]) 502; on the “living law” EHRLICH (1967 [1911]); EHRLICH (1986 [1920]); EHRLICH (2007 [1920]).

142 On customary law EHRLICH (1975 [1913/1936]) ch. 19, 436–471; on the “rule of life”, see EHRLICH (1903) 36; on “organizational form” and “norms for decision” EHRLICH (1973 [1906]) 7–14; on “The Norms for Decision” EHRLICH (1975 [1913/1936]) ch. VI, 121–136.

that the law has recognized but also of those that it has overlooked and passed by, indeed even of those that it has disapproved.”¹⁴³

Ehrlich understood the sociology of law as a “science of observation”.¹⁴⁴ He was concerned with “method”, with “phenomena” and “facts”.¹⁴⁵ Of course, Ehrlich’s newly founded sociology of law could not provide the methodological instruments of today’s empirical social sciences. But his alternative law was meant to be sociological, less normative, and by no means doctrinal. He sought ‘living law’ in the customs and order of social associations.

4.3.3 *Interlegality*

Ehrlich’s sociological jurisprudence focused on the social emergence and empirical observation of law. However, this did not necessarily mean interlegality. Rather, some elements of Ehrlich’s legal thought seem to presuppose a general and uniform sense of law, social order and ratio. For instance, he cherished the “teachers of the law of nature school in the seventeenth and eighteenth centuries” as well as the “founders of the Historical School”. With both, he positively conceived the (one) “nature of man” or the (undivided) “legal consciousness of the people”.¹⁴⁶ In a rarely read essay, he even presumes that the “social order [...] is mainly the same in the civilized states”, yes, “even among the savages and the barbarians”.¹⁴⁷ In consequence, this could also mean that the living law had to be quite similar, or even the same, in all societies.

Besides these little doubts, Ehrlich’s thinking was driven by a strong sense for interlegality. This interlegality was not limited to the contradiction between the official and the living law. Ehrlich’s methodological credo *Freirecht* (free law) also pleaded for it. This method or movement was highly critical of the normative quality of state law.¹⁴⁸ While Ehrlich did not negate the normative power of this law in the books, he demanded an interplay of state law, legal doctrine, and free law – with a huge bias toward free law.

143 EHRlich (1975 [1913/1936]) 493.

144 EHRlich (1975 [1913/1936]) 473.

145 EHRlich (1975 [1913/1936]) 473–474.

146 EHRlich (1975 [1913/1936]) 15–16.

147 EHRlich (1922) 241–242.

148 For the so-called “Freirechtsschule” or “Freirechtsbewegung” see RÜCKERT (2008) 201–224.

That is why Ehrlich defended and widened the gaps in doctrine and law.¹⁴⁹ He demanded that the free judge close these gaps sociologically with the ‘living law’.¹⁵⁰ The alternative law supplemented, ensnared, and undermined the state law: “So in the last analysis the state of the law is a resultant of the cooperation, the interaction, and the antagonism of state and society.”¹⁵¹ Finally, Ehrlich’s concept of legal science or doctrine was an inter-legal one. He gave the doctrine of legal sources a sociological turn. He called for “the facts of the law themselves”, and with that he meant: “usage”, “relations of domination and of possession”, “agreements”, “articles of association”, “dispositions by last will”, and “succession” – but from a sociological perspective.¹⁵² And, most importantly, Ehrlich gave all kinds of communities an equal right to legislation and lawmaking.

Kelsen, on the other hand, was not interested in interlegality. He relied on normative hierarchy. The logic of his *Stufenbau* (hierarchical structure) and his *Grundnorm* (basic norm) was deductive and hierarchical. This becomes particularly clear in his examination of the “conflict between norms of different levels” or the problem of “unconstitutional law”.¹⁵³ Kelsen’s solution to the problem was impressively simple: “The lower level norm shall remain in force despite its content contrary to the higher level norm. This happens in accordance with the principle of legal force laid down by the higher level norm itself.”¹⁵⁴ In Kelsen’s legal theory, there was no place for inconsistency and, therefore, no room for interlegality. As an epistemological premise, the “unity of the legal system” was irrevocably established.

4.3.4 *Nomos*

The search for ideological preferences in Kelsen’s and Ehrlich’s work is difficult. Even the classification of both into political camps is hardly possible. While Kelsen is usually assigned to a liberal, socialist, and democratic spectrum, Ehrlich’s political labels have largely proved to be wrong.¹⁵⁵ Pri-

149 See EHRlich (1903) 17; EHRlich (1888).

150 See EHRlich (1918) 313; VOGL (2009) 115; REHBINDER (1995 [1988]) 196.

151 EHRlich (1975 [1913/1936]) 388.

152 EHRlich (1975 [1913/1936]) 474.

153 KELSEN (2008 [1934]) 84–89.

154 KELSEN (2008 [1934]) 87.

155 For Kelsen see H. DREIER (1990) 249, fn. 2; for Ehrlich VOGL (2003) 321–325.

ma facie, their debate had a mere theoretical or academic character. Both sought some kind of ‘pure jurisprudence’, even Ehrlich: “The name sociology of law therefore expresses the fact that it is a pure legal science, with the exclusion of any practical application, be it in jurisprudence or in legal policy.”¹⁵⁶

For Kelsen as much as for Ehrlich, it was important that jurisprudence or legal theory should not be judged by their practical and political applicability. However, many other methodological presumptions of both fell far apart. Kelsen believed in critical objectivity, scientific accuracy and methodological stringency. These attributes characterized his ideal of an “anti-ideological” legal theory.¹⁵⁷ Ehrlich, on the other hand, demanded artistic and methodological freedom: “Method is as infinite as science itself.”¹⁵⁸ This was the final sentence of his *Fundamental Principles of the Sociology of Law*.

At second glance, Kelsen’s legal theory was directly connected to his political theory. Firstly, Kelsen’s pure theory of law is decidedly committed to the rule of law: “Before the law, but not before culture, all are equal.”¹⁵⁹ Secondly, Kelsen was very concerned with the “Verteidigung der Demokratie” (defense of democracy) in the 1930s.¹⁶⁰ The positive concept of law referred directly to legislation, which in democracy was the responsibility of the parliament. This is the place where different interests and values, class differences and ideologies, in short, diversity and pluralism, were negotiated.

4.3.5 Conclusion

After 1900, the setting of legal pluralism changed. The so-called *etatistischer Rechtspositivismus* (state legal positivism) now had the applicable law on its side. This, of course, also changed the debates in the German-speaking jurisprudence. Kelsen decisively asserted the identity of law and the state. For him, every kind of dualism was tantamount to ideology. There was no alternative law to state law and, therefore, no room for interlegality. But he did not demonize every form of pluralism. His political hope for the rule of law

156 EHRlich (1986 [1913/14]) 179.

157 See the chapter “Die anti-ideologische Tendenz der Reinen Rechtslehre” in Kelsen (2008 [1934]) 16–18.

158 EHRlich (1975 [1913/1936]) 506, further 472.

159 Kelsen (1984 [1911]) 371.

160 See Kelsen (2006 [1932]); Kelsen (2006).

and democracy shifted pluralism only to another place: to legislation and to the parliament. Kelsen advocated political pluralism.

While Kelsen took public law as his point of departure, Ehrlich's legal thinking originated from the older traditions of legal pluralism in German private law. He postulated a free and living law against codification. His law did not require the state; rather, it grew in social associations and depended on the social order, not as much on coercion. For this reason, he relied on the sociology of law, not on legal doctrine. Ehrlich opened up jurisprudence to allow in the infinite world of alternative law. For integrating the emerging interlegality through his methodological concept of free law, Ehrlich remains one of the most important forefathers of legal pluralism.

4.4 Gustav Radbruch and the National Socialist dictatorship

In spring 1945, with the end of the Second World War also came the end of National Socialism in Germany. Today, May 8 is an important part of the German culture of remembrance. In 1945, this date marked *Stunde Null* (zero hour) – which simultaneously characterized the end and a new beginning,¹⁶¹ when German society in general, and German jurisprudence in particular, were confronted with a serious ethical crisis. Too many lawyers were involved in the National Socialist regime and its injustice. Lena Foljanty reports on this “crisis of law”:

“In National Socialism, crimes had been committed also in the name of the law and by the courts. Simply going over to the everyday agenda was not an option for lawyers after 1945. In the first publications after the end of the war, lawyers looked for a way to deal with the frequently invoked ‘crisis of the law’. [...] The so-called ‘natural law renaissance of the post-war period’ began as soon as war and National Socialism had ended.”¹⁶²

The new Federal Republic of Germany had not yet been founded when lawyers began to seek their salvation in a “renaissance of natural law”. In legal philosophy, the keyword “natural law after 1945” is usually no longer taken as seriously anymore.¹⁶³ After the end of National Socialism, however, the self-image of jurisprudence was at stake. Therefore, the renaissance of

161 See KAUHAUSEN (2007).

162 FOLJANTY (2013) 2; all quotes from this text are my translation.

163 E. g. FOLJANTY (2013) 3.

natural law was not merely a philosophical debate. The authors wrote from Catholic, Protestant or secular perspectives. They pursued various practical, political, or ideological concerns. Lena Foljanty continues to write about literary production:

“The end of the Second World War and National Socialist rule did not silence German jurisprudence – on the contrary. Soon the first articles appeared, first in the daily press, then in the legal journals, which were gradually refounded from 1946 onwards. Small booklets were published, 60 pages, 70 pages, rarely more. Leafing through these first post-war publications, the presence of the recent past catches the eye. There was talk of ‘painful’ or ‘bitter’ experiences, of ‘brute force’ and ‘barbarism’, of a ‘fever dream’ and an ‘apocalyptic epoch’ that had now been left behind. [...] The texts show consternation at what has happened and testify to the need to express it. But above all they speak of the awareness of a deep crisis of law and jurisprudence.”¹⁶⁴

The best-known voice from this “crisis of the law” today is that of Gustav Radbruch (1878–1949). Radbruch was neither at the center of discussions on natural law, nor did he represent any of the Christian or secular approaches.¹⁶⁵ He also had no personal involvement in National Socialism. As a former Reich Minister of Justice in the Weimar Republic and as a member of the *Sozialdemokratische Partei Deutschlands* (Social Democratic Party of Germany, SPD), he was forced to retire in 1933 as “one of the first teachers of law”.¹⁶⁶ He did not go into exile, as he was forced to stay in Heidelberg. After the end of the war, he became dean of the Heidelberg Law Faculty. As an uncontaminated opponent of the regime, his word held considerable weight. Two short texts, from September 1945 and from August 1946, achieved extraordinary fame: *Fünf Minuten Rechtsphilosophie* (Five minutes of legal philosophy) and *Gesetzliches Unrecht und übergesetzliches Recht* (Statutory Lawlessness and Supra-Statutory Law), respectively. In the latter, Radbruch developed his famous ‘formula’ for the “conflict between justice and legal certainty”:

“The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute

164 FOLJANTY (2013) 1.

165 See FOLJANTY (2013) 16–17.

166 SPENDEL (2003); for further biographical data R. DREIER/PAULSON (1999).

and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, the statute is not merely ‘flawed law’, it completely lacks the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.”¹⁶⁷

This so-called ‘Radbruch formula’ and the natural law debates after 1945 are usually not connected to legal pluralism. This is true only at first glance. On second glance, Radbruch’s answer to National Socialist injustice contains all four elements of legal pluralism. It even establishes a genuine tradition of legal pluralism: ‘transitional legal pluralism’.

4.4.1 *Law without a state*

Criticism of state law was a recurring motif in natural law literature after 1945. The “bogeyman of positivism”¹⁶⁸ was omnipresent in the debates. Adolf Süsterhenn, for example, formulated this clearly:

“The legal positivist, who regards the state as the source of all law, naturally revolves around the state in his political thinking. He will be inclined to proclaim the supremacy of the state in all areas of life. For him, the state is ultimately the highest value of human life. [...] In his basic attitude the legal positivist will always be state totalitarian. For if the state is the sole creator of law, then all other rights ultimately go back to state conferment and can, therefore, at any time be restricted or even abolished by the state.”¹⁶⁹

Süsterhenn reduced legal positivism to state positivism. In 1947, the word “state” primarily conjured images of the National Socialist state that had just been defeated. It was difficult to oppose this argument. The memories of recent German history were too present.

Radbruch also polemicized against “positivism”. He shared the widespread thesis that “positivism” “has in fact rendered the German legal pro-

167 RADBRUCH (2006b [1946]) 7.

168 See FOLJANTY (2013) 23–36.

169 SÜSTERHENN (1991 [1947]) 116; my translation.

fession defenceless against statutes that are arbitrary and criminal”.¹⁷⁰ But Radbruch did not turn against state law in general; in fact, the word “state” does not appear in both texts. Radbruch equated “positivism” with “power” and with “arbitrariness”.¹⁷¹

“The most conspicuous characteristic of Hitler’s personality, which became through its influence the pervading spirit of the whole of National Socialist ‘law’ as well, was a complete lack of any sense of truth or any sense of right and wrong. Because he had no sense of truth, he could shamelessly, unscrupulously lend the ring of truth to whatever was rhetorically effective at the moment. And because he had no sense of right and wrong, he could without hesitation elevate to a statute the crudest expression of despotic caprice.”¹⁷²

Radbruch did not write about the state, but about “Hitler” and the “spirit of the whole of National Socialist ‘law’”. He was less interested in ‘law without a state’ than in some kind of law that was opposed to the National Socialist arbitrariness. His political enemy was National Socialism, not the state in general. Nevertheless, in dealing with National Socialist injustice, he did not rely solely on state law.

4.4.2 *Alternative law*

Radbruch’s concept of alternative law corresponds to this criticism of National Socialist arbitrariness. Over and over again, he opposed law to arbitrariness and power. That is why he wrote of “National Socialist ‘law’” – if at all – only using distancing commas.¹⁷³ He bound the proper use of the term “law” to “the will to justice”, and with justice, he intended to “judge without regard to the person, to measure everyone by the same standard”.¹⁷⁴ He described his notion of alternative law in the following words:

“There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason. To be sure, their details remain open to question,

170 RADBRUCH (2006b [1946]) 7; see also RADBRUCH (2006a [1945]), First Minute. This accusation was not singular with Radbruch, but very common at the time. It can probably not be ascribed to any single author, see FOLJANTY (2013) 19.

171 See RADBRUCH (2006b [1946]) 7; RADBRUCH (2006a [1945]), Second Minute.

172 RADBRUCH (2006b [1946]) 7.

173 RADBRUCH (2006b [1946]) 8.

174 RADBRUCH (2006a [1945]), Third Minute.

but the work of centuries has in fact established a solid core of them, and they have come to enjoy such far-reaching consensus in the so-called declarations of human and civil rights, that only the dogmatic sceptic could still entertain doubts about some of them.”¹⁷⁵

Radbruch did not spell out a natural law doctrine. His supra-statutory law had a corrective function. The starting point for Radbruch’s legal thought were “legal enactments” that were “in conflict” with higher “principles of law”. The same applies to his famous formula, which did not establish some concrete concept of natural law. Rather, it was a pragmatic formula about the “conflict between statute and justice” that “reaches such an intolerable degree that the statute [...] must yield to justice”. It was about the enactment of “positive law” where there was “not even an attempt at justice”, where “equality” was “deliberately betrayed”.¹⁷⁶ Radbruch did not aim to justify any kind of (positive) law, he just argued for the non-applicability of the National Socialist arbitrariness. His alternative law did not constitute a legal order, it only corrected the “flawed law” of National Socialism.

4.4.3 *Interlegality*

Although Radbruch, as a democrat and former minister of justice, pleaded neither for a law without a state nor for an alternative natural law, problems of interlegality were at the center of his two essays. Today, such disputes concerning state injustice after a societal or political radical change go by the keyword ‘transitional justice’. Radbruch did not negotiate anything else. His cases revolved around informers and deserters, judges and executioners. He referred to four different types of cases:¹⁷⁷

(1) A “justice department clerk” denounced a “merchant” who had left the inscription “Hitler is a mass murderer and to blame for the war” on “the wall of a WC”. The denounced man was sentenced to death and executed. After the end of National Socialism, the Thuringian Criminal Court condemned the clerk “as an accomplice to murder”.

(2) A “soldier from Saxony” deserted and was “discovered” while “stopping by his wife’s apartment”. On the run, he killed a sergeant. After the war,

175 RADBRUCH (2006a [1945]), Fifth Minute.

176 RADBRUCH (2006b [1946]) 7.

177 See for the cases RADBRUCH (2006b [1946]) 2–6.

he returned to Germany and was imprisoned. The “Chief Public Prosecutor” of Saxony then “ordered his release and the abandonment of criminal proceedings” against him.

(3) Judges made countless “inhuman judgments”.

(4) Executioner’s assistants helped with numerous unlawful executions.

All the cases described by Radbruch were normatively tragic. There was no simple and just solution. On the one hand, the injustice and arbitrariness of National Socialism and the guilt of those involved weighed heavily. On the other hand, the retroactive conviction of the damned would have relied on other forms of fundamental injustice. Radbruch, therefore, refused to impose a general rule in dealing with National Socialist arbitrariness:

“In the language of faith, the same thoughts are recorded in two verses from the Bible. It is written that you are to be obedient to the authorities who have power over you, but it is also written that you are to obey God rather than men – and this is not simply a pious wish, but a valid legal proposition. A solution to the tension between these two directives cannot be found by appealing to a third – say, to the dictum: ‘Render to Caesar the things that are Caesar’s, and to God the things that are God’s’. For this directive, too, leaves the dividing line in doubt. Or, rather, it leaves the solution to the voice of God, which speaks to the conscience of the individual only in the particular case.”¹⁷⁸

With the four mentioned cases and the normative tragedy in mind, Radbruch developed his interlegal ‘formula’. He incorporated a second layer into the law. ‘Justice’ and ‘equality’ became directly applicable – but only as a corrective and only under certain circumstances. However, the positive law remained untouched. Therefore, Radbruch, for example, referred to the *Reichsstrafgesetzbuch* (German penal code) of 1871 and the laws of the Allied Control Council passed after 1945.¹⁷⁹ All these sources of law, the positive law of his time, and the supra-statutory law characterized Radbruch’s understanding of interlegality.

4.4.4 *Nomos*

One last element is necessary to understand Radbruch’s legal pluralism. In both texts, he was decisively committed to the *Rechtsstaat* (rule or govern-

178 RADBRUCH (2006a [1945]), Fifth Minute.

179 RADBRUCH (2006b [1946]) 8–9.

ment of law) and to democracy.¹⁸⁰ As a former minister of justice of the Weimar Republic, and as a democrat, he could not plead for natural law or a ‘rule of justice’. In the first three editions of his legal philosophy of 1914, 1922 and 1932, Radbruch had advocated legal positivism.¹⁸¹ This did not change fundamentally after 1945. He argued for the *Rechtsstaat* and a very limited correction of positive law.¹⁸² In both essays from 1945 and 1946, he never assumed an applicable ‘natural law’. He wrote about “principles of law” that “*are known* as natural law”.¹⁸³ And he historicized this so-called ‘natural law’ empirically and positively. It was the “work of the centuries” and positively legislated in the “declarations of human and civil rights”.¹⁸⁴ Radbruch’s *nomos* is finally evident in the last two sentences of the essay:

“We must seek justice, but at the same time attend to legal certainty, for it is itself a component of justice. And we must rebuild a *Rechtsstaat*, a government of law that serves as well as possible the ideas of both justice and legal certainty. Democracy is indeed laudable, but a government of law is like our daily bread, like water to drink and air to breathe, and the best thing about democracy is precisely that it alone is capable of securing for us such government.”¹⁸⁵

4.4.5 Conclusion

Even though Radbruch is usually not mentioned in the debates on legal pluralism, his famous essays from 1945 and 1946 made him a true pluralist. His supra-statutory law opened up a second normative layer in law to deal with the National Socialist arbitrariness and injustice. This law was no simple natural law, it gained its validity through history and through positive declarations. Anyhow, with his supra-statutory law, Radbruch had opened the box of interlegality. Cases relating to National Socialist arbitrariness had at first to be decided by positive law. But then, in a second step, the supra-statutory law had to be able to correct these results, if necessary. Even though

180 For Radbruch’s notion of democracy KLEIN (2007) and *Rechtsstaat* SALIGER (1995).

181 See RADBRUCH (1999a [1932]) § 9, p. 70.

182 See FOLJANTY (2013) 56.

183 RADBRUCH (2006a [1945]) Fifth Minute, emphasis added. In the German original, RADBRUCH (1999c [1945]), this distance toward ‘natural law’ is even more obvious. Radbruch there writes: “Man *nennt* diese Grundsätze das Naturrecht oder das Vernunftrecht.” They are just ‘called’ natural law.

184 The “work of the centuries” emphasized first and foremost by RÜCKERT (2015 [1998]) 131.

185 RADBRUCH (2006b [1946]) 11.

Radbruch did not demand a law without a state, his plea for *Rechtsstaat* and for democracy in the discussion of National Socialist arbitrariness made him the first advocate of a transitional legal pluralism.

4.5 Franz von Benda-Beckmann and postcolonial Malawi

After the so-called ‘renaissance of natural law’ ended in the 1950s, German jurisprudence rediscovered legal sociology in the following decades. Besides that, the social movements of the 1960s and 70s, of course, also influenced the course of German legal thought. Especially the left-wing jurisprudence gained a stronger voice in this time. Authors like Rudolf Wiethölter blustered against the “bourgeois law” of the 19th century in his notorious book *Rechtswissenschaft* (Legal Science).¹⁸⁶ Others like Rüdiger Lautmann proclaimed *Soziologie vor den Toren der Jurisprudenz* (Sociology on the Gates of Jurisprudence), alluding to the expression *Hannibal ante portas*.¹⁸⁷ These are the more general contexts in which Franz von Benda-Beckmann (1941–2013) wrote his famous dissertation, *Rechtspluralismus in Malawi* (Legal Pluralism in Malawi), published in 1970.¹⁸⁸ However, he did not write it as a legal sociologist or legal anthropologist, as he did later together with his wife Keebet von Benda-Beckmann.¹⁸⁹ Legal anthropology was not yet an established discipline in jurisprudence when Benda-Beckmann wrote his dissertation at the Institute for International Law at the University of Kiel.

4.5.1 *Law without a state*

The slogan, ‘law without a state’, did not appear in Benda-Beckmann’s book on “Legal Pluralism in Malawi” at all. Surprisingly, Benda-Beckmann mainly wrote about state law. His study was based on sources from the official ‘archives’ of the state and on interviews with judges from different state courts. In this early work, Benda-Beckmann wrote as a lawyer who was

186 WIETHÖLTER (1968).

187 LAUTMANN (1971).

188 BENDA-BECKMANN (1970); BENDA-BECKMANN (2007 [1970]).

189 See e. g. FRANZ and KEEBET VON BENDA-BECKMANN (2007); FRANZ and KEEBET VON BENDA-BECKMANN (2014).

applying for a Doctor of Law in Germany. He was, therefore, concerned with the reconstruction of the “judicial” and “legal system” of postcolonial Malawi.¹⁹⁰ He investigated “customary courts”, “local courts”, “local appeal courts”, and “British courts”, which were all part of a single judicial system.¹⁹¹ The same was the case for substantive law. Benda-Beckmann wrote about the “law, which was applicable in the Malawian courts”.¹⁹² “Legal Pluralism in Malawi” was not on ‘law without a state’.

4.5.2 *Alternative law*

Even though Benda-Beckmann was primarily dealing with the law applicable in state courts, he focused on “indigenous” or “customary laws” and “religious law”. They represented two of “four complexes” of the Malawian legal order next to “local statutes” and “English law”.¹⁹³ He, therefore, discussed in detail the applicability of “indigenous laws” under article 20 of the British Central Africa Order in Council from 1902. The crucial question was the meaning of the rule that courts should also be “guided by native law”.¹⁹⁴ Ultimately, however, this analysis underscored that Benda-Beckmann’s early work still had a bias toward the state, and hence only analyzed “weak legal pluralism”.¹⁹⁵

4.5.3 *Interlegality*

Anyhow, interlegality stood at the center of Benda-Beckmann’s early concept of legal pluralism. He explained the introduction of the concept with respect to the sources of Malawian law:

“The law applied in Malawian courts has different legal sources. If one generally speaks of a legal dualism, this is only a rough indication of the coexistence of two areas of law, that of ‘English’ law on the one hand and that of traditional law on the other. If, however, one considers that the laws of the individual tribes are usually

190 BENDA-BECKMANN (2007 [1970]) 13.

191 BENDA-BECKMANN (2007 [1970]) 38–41.

192 BENDA-BECKMANN (2007 [1970]) 46.

193 BENDA-BECKMANN (2007 [1970]) 46.

194 BENDA-BECKMANN (2007 [1970]) 57–62.

195 See GRIFFITHS (1986) 5–6.

different, and that ‘English’ law is also composed of different types of law, it is more appropriate to speak of legal pluralism.”¹⁹⁶

Read in its time and context, i. e., German legal doctrine in 1970, this is a truly sophisticated explanation of legal pluralism. Benda-Beckmann not only points to the coexistence of different laws in the same legal field, i. e., the court. He also deconstructed the concepts of ‘customary law’ and ‘western law’ by emphasizing their internal legal pluralism. The indigenous law differed from tribe to tribe, just as English common law had manifold roots.

4.5.4 Nomos

Of course, in 1970, the fight for indigenous laws and indigenous rights was far from reaching its climax. Benda-Beckmann was not yet an anthropologist, he became one only later, in the 1970s, in Zurich.¹⁹⁷ He wrote the first German book on legal pluralism at an institute for international law. Even though legal positivism at these times only seldom meant to be a compliment, a more or less positivist and doctrinal approach dominated German practical jurisprudence. Anyhow, his work was not committed to the paradigms of legal positivism or the Historical School of Jurisprudence; it followed an empirical or descriptive method.

4.5.5 Conclusion

On the one hand, it is truly surprising that “Legal Pluralism in Malawi” still stuck to the paradigm of state law and, therefore, only developed a ‘weak legal pluralism’. ‘Law without a state’ was not a core concept for Benda-Beckmann. Further, he investigated alternative law only from the perspective of state courts. On the other hand, read in its time, “Legal Pluralism in Malawi” was an important book for the later evolution of legal anthropology in Germany and the concept of legal pluralism in general. Methodologically, it was more empirical and descriptive than normative or doctrinal. Moreover, its subject, the different legal layers in a postcolonial state and in its adjudication, constituted interlegality and, therefore, was an important

196 BENDA-BECKMANN (2007 [1970]) 46.

197 For Benda-Beckmann’s biographical data see HÖLAND/BLANKENBURG (2012/13).

milestone toward the more elaborated concepts of legal pluralism in the 1980s and 1990s.

4.6. Gunther Teubner and the global law

After 1990, when new debates on ‘legal pluralism’ became possible with the end of the Cold War, Gunther Teubner was one of the most influential writers. In his two essays from 1992 and 1996, respectively, he developed his concept of a global legal pluralism: “The two Faces of Janus: Rethinking Legal Pluralism” and “Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus” (Global Bukovina. On the Emergence of Transnational Legal Pluralism).¹⁹⁸ Especially the latter, “Global Bukovina”, became one of the most famous and important essays on global legal pluralism.

4.6.1 *Law without a state*

Hardly any other author represents the slogan “global law without a state” better than Gunther Teubner.¹⁹⁹ He fought against “the tremendous resistance” from a “world” which was “still conceptually dominated by the nation state” and against the “taboo of the unity of state and law”.²⁰⁰ By that, he did not bid a general farewell to the state. First of all, he directed his criticism against state-centered concepts of law:

“Their arguments are based on the nineteenth-century notion of the unity of law and state: a so-called ‘anational’ law is unthinkable! On this viewpoint, any legal phenomenon in the world necessarily has to be ‘rooted’ in a national legal order; it needs at least a ‘minimal link’ to national law.”²⁰¹

Teubner identified numerous challenges in the recognition of non-state law: territorial validity, “coercive powers”, “commercial customs”, “standardized contracts”, “private associations”, “international arbitration” etc.²⁰² For him,

198 TEUBNER (1992); TEUBNER (1995); TEUBNER (1996); TEUBNER (1997a), the English title of the “Global Bukovina” slightly differed from the German one, that’s why it was translated here independently.

199 TEUBNER (ed.) (1997b).

200 TEUBNER (1997a) 10.

201 TEUBNER (1997a) 10.

202 TEUBNER (1997a) 10.

they all arose with the question of the legality of a global *lex mercatoria*. He, however, did not look at them from the perspective of the nation state. Teubner's "new legal pluralism" was "nonlegalistic, nonhierarchical, and noninstitutional".²⁰³ He pleaded for the autonomous recognition of a global or transnational law – independent of state law, state courts and state enforcement.

This focus on the social emergence of law set Teubner in a tradition that can be traced back to Eugen Ehrlich and Friedrich Carl von Savigny. He opposed the "hegemonic claims of politics".²⁰⁴ Instead, he trusted "civil society", which would "globalize its legal orders".²⁰⁵ He argued "empirically and normatively": "Empirically [...] the political-military-moral complex will lack the power to control the multiple centrifugal tendencies of a civil world society. And normatively [...] for democracy, it will in any case be better if politics is as far as possible shaped by its local context."²⁰⁶ With that, legal pluralism became an alternative to "political theories of law", i. e., to "positivist" and "critical theories". While positivist theories "stress the unity of state and law", "critical theories tend to dissolve law into power politics".²⁰⁷ Both focused excessively on the state, while legal pluralism made it possible to conceive the feasibility of "law without a state" – in a world where there is no global state and where there should be no global state.

4.6.2 *Alternative law*

For Teubner the alternative to political legislation was societal law. He conceptualized it with Eugen Ehrlich as a "living law".²⁰⁸ But he didn't share his theory of legal sources. The missing "strong, independent, large-scale development of genuine legal institutions" spoke against the assumption of a global "lawyer's law".²⁰⁹ Further, as the "operational criteria" for "customary law", like the "*consuetudo*" and the "*opinio iuris*", could not be found on a

203 TEUBNER (1992) 1448.

204 TEUBNER (1996) 259; see further TEUBNER (1997a) 5.

205 TEUBNER (1997a) 3.

206 TEUBNER (1997a) 3.

207 TEUBNER (1997a) 6.

208 TEUBNER (1997a) 6–7.

209 TEUBNER (1997a) 6.

global scale,²¹⁰ Teubner instead switched to a plural concept of legal sources, which he backed theoretically with systems theory:

“Of course, this presupposes a pluralistic theory of norm production which treats political, legal and social law production on equal footing [...]. However, taking into account the fragmented globalization of diverse social systems, this theory would give different relative weights to these norm productions. A theory of legal pluralism would perceive global economic law as a highly asymmetric process of legal self-reproduction. Global economic law is law with an underdeveloped ‘centre’ and a highly developed ‘periphery’. To be more precise, it is a law whose ‘centre’ is created by the ‘peripheries’ and remains dependent on them.”²¹¹

With that, Teubner redefined the focus of systems and legal theory, so that “sanction” would no longer serve as a “central concept for the definition of law”.²¹² The same was also true for other core “concepts of classical sociology of law” like “rule” or “social control”.²¹³ Teubner proclaimed a “linguistic turn”.²¹⁴

“Now, if we follow the linguistic turn we would not only shift the focus from structure to process, from norm to action, from unity to difference but, most important for identifying the legal proprium, from function to code [...]. This move brings forward the dynamic character of a world-wide legal pluralism and at the same time delineates clearly the ‘legal’ from other types of social action. Legal pluralism is then defined no longer as a set of conflicting social norms but as a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal.”²¹⁵

Teubner’s most important point here is to turn from function to code. Law could fulfil many different functions: “social control”, “conflict resolution”, “coordinating behavior”, “securing expectations”, or simply to “discipline and punish”.²¹⁶ Therefore, Teubner focusses on communications in legal practice:

“The phenomenon to be identified is a self-reproducing, worldwide legal discourse which closes its meaning boundaries by the use of the legal/illegal binary code and reproduces itself by processing a symbol of global (not national) validity.”²¹⁷

210 TEUBNER (1997a) 9.

211 TEUBNER (1997a) 11–12.

212 TEUBNER (1997a) 12.

213 TEUBNER (1997a) 12.

214 TEUBNER (1992) 1450.

215 TEUBNER (1997a) 14, emphasized in the original.

216 TEUBNER (1992) 1450.

217 TEUBNER (1997a) 12, emphasized in the original.

In the language of legal sources this meant “to define contracting itself as a source of law”.²¹⁸ And “as soon as these contracts claim transnational validity, they cut off not only their national roots but their roots in any legal order”.²¹⁹ By making contracting itself a genuine and autonomous source of law, however, Teubner was confronted with a substantial theoretical challenge. How could a contract or treaty put itself into effect? Without a legal order, every contract was only a “*contrat sans loi*”.²²⁰ That is why Teubner was looking for mechanisms that would “conceal the paradox of self-validation”, the paradox of a contract that creates law without being backed by law.²²¹ His answer was intriguing: Teubner observed “three ways of de-paradoxification – time, hierarchy and externalization – that mutually support each other and make it possible”.²²² With “time”, he meant that the “present contract” was able to “extend itself into the past and into the future”.²²³ The contractual practice made it possible that a single contract referred to the “pre-existing standardization of rules” as well as “to the future of conflict regulation”.²²⁴ By that, the “contract” became an “element in an ongoing self-production process in which the network of elements” created “the very elements of the system”.²²⁵ “Hierarchy” then was ascribed less to a more systemic view than to a normative one. Teubner identified two different types of norms in the contractual practice. Primary rules of conduct were supplemented by secondary rules. The latter established a regime of legal recognition or procedural standards for setting the new law. Finally, the questions of validity and resolution of conflicts were “externalized”. It was up to “arbitral tribunals” to negotiate and resolve them. As institutions, they were both non-contractual and contractual at the same time:

“It refers to a pre-existing standardization of rules and it refers to the future of conflict regulation and, thus renders the contract into one element in an ongoing self-production process in which the network of elements creates the very elements of the system.”²²⁶

218 TEUBNER (1997a) 18.

219 TEUBNER (1997a) 15.

220 TEUBNER (1997a) 15.

221 TEUBNER (1997a) 16.

222 TEUBNER (1997a) 16.

223 TEUBNER (1997a) 16.

224 TEUBNER (1997a) 16.

225 TEUBNER (1997a) 16.

226 TEUBNER (1997a) 17.

4.6.3 *Interlegality*

Even though Teubner was opting for legal pluralism and a plural concept of legal sources, he claimed “the unity of global law”.²²⁷ But this unity was conceived in terms of systems theory with “interlegality” at its heart:²²⁸

“To gain a more precise understanding of this, one must proceed from the assumption that law, following the logic of functional differentiation, has established itself globally as a unitary social system beyond national laws. [...] This unity is not a normative unity of law but is characterised by a multitude of fundamental contradictions of legal norms. Legal unity within global law is redirected away from normative consistency towards operative ‘interlegality’. Interlegality does not only mean the existence of a static variety of normative systems which are strictly separated from each other [...], but also of a dynamic variety of normative operations, in which ‘parallel norm systems of different origin stimulate each other, interlock and permeate, without coalescing into united super-systems that absorb their parts, but permanently coexist as heterarchical formations’.”²²⁹

Below the unity of the code, Teubner observed various “norm systems” and “numerous fundamental norm contradictions”. But in the operations of law, i.e., in negotiations and decisions, this diversity is repeatedly transformed into a new unity.

As far as the legal doctrine was concerned, Teubner trusted in the principles of conflict of laws. He was looking for an intersystemic collision law. This meant that the “applicable national or transnational legal order” depended on where the “social sector of the legal relationship” was “located”.²³⁰ An intersystemic *comitas* and a transnational *ordre public* supported it.²³¹ Further on, a substantive law approach should “create a new rule of substantive law, which integrates elements of all competing legal orders”.²³²

In addition to operative and doctrinal interlegality, Teubner offered a third option, which he named “interdiscursivity”. With this term, he described the emergence of legal norms from non-legal norms. This fascinating figure worked with so-called “productive misunderstandings”.²³³ Social systems

227 TEUBNER/KORTH (2012) 28.

228 See SEINECKE (2015) 242–243.

229 TEUBNER/KORTH (2012) 28, quoting AMSTUTZ (2003) 213.

230 TEUBNER/KORTH (2012) 35.

231 TEUBNER/KORTH (2012) 37.

232 TEUBNER/KORTH (2012) 38.

233 TEUBNER/KORTH (2012) 47.

only seldom talked about law. However, when the legal system approached them with its *quaestio juris*, law confronted a “huge”, but “creative misunderstanding”.²³⁴ Non-law became law. Legality arose from sociality.

4.6.4 *Nomos*

Gunther Teubner did not pursue an open ideological agenda. His commitment to “law without a state” or to the sociologic assumption of a global legal system did not imply a certain political point of view. Teubner was concerned with the limitation of the political claim of the modern state, and therefore with a different policy:

“Its relative distance from international politics will not protect global law from its repoliticization. On the contrary, the very reconstruction of social and economic (trans)actions as a global legal process undermines its non-political character and is the basis of its repoliticization. Yet this will occur in new and unexpected ways. We can expect global law to become politicized not via traditional political institutions but within the various processes under which law engages in ‘structural coupling’ with highly specialized discourses.”²³⁵

Teubner did not oppose politics. He simply voted for a different kind of politics, or more precisely, for manifold kinds of politics. He was interested in the idiosyncratic politics of many social systems: the politics of economy, of science, of religion or of art. In the language of political philosophy, that meant:

“Rethinking legal pluralism in the end could open an ‘ecological approach’ to law and legal intervention. Indeed, the intellectual tradition of ‘private law’ which paved the way for law’s historical extraordinary responsiveness to the economic system via the institutions of property, contract, and organization needs to be generalized. Social autonomy is the key word.”²³⁶

4.6.5 *Conclusion*

Gunther Teubner joined the tradition of social law that was akin to Savigny’s notion of law in a very specific way. His “law without a state” was primarily opposed to a politically mandated law on a global scale. However, “without a state” meant many things to Teubner: law without political mandate, law

234 TEUBNER/KORTH (2012) 45.

235 TEUBNER (1997a) 4.

236 TEUBNER (1992) 1461.

without state coercion, and law without a center, but, finally, also: law without a simple function, structure, norm or unity. Therefore, his alternative global law focused on communication. The communicative use of the code legal/illegal established law. Teubner then conceptualized the global legal system as interlegal. It emerged at the borders between the legal and other social systems. Methodologically, he called for an interlegal conflict of laws regime by rendering legal sources to “interdiscursivity”, i.e., he was calling for the metamorphosis of non-legal into legal norms. In addition, Teubner’s alternative law as “living law” was, above all, contractual law. He established its validity solely based on the contractual practice itself, without any higher legal order.

5 Results

The history of legal thought in Germany is replete with references to legal pluralisms *avant la lettre*, prominently in the writings of Friedrich Carl von Savigny and Anton Friedrich Justus Thibaut, of Otto von Gierke, Eugen Ehrlich, Gustav Radbruch, and, not least, more recently, in the works of Franz von Benda-Beckmann and Gunther Teubner. Even though many of these authors did not use the word ‘legal pluralism’, their concepts and theories of law shared many features of it. Anyhow, their political, legal and scientific situation was central to their pluralistic legal thought. The most important political influence came from the establishment of the nation state. The enactment of the German Civil Code, and with that the end of the intricate validity of Roman law, brought about a fundamental change to law. Finally, the transition of scientific preferences and paradigms, from legal history, to state legal positivism, or legal sociology made different legal pluralisms possible and necessary. As a result, three types of legal pluralism in German legal thought can be distinguished: legal pluralism before and beyond the nation-state, legal pluralism inside the nation state, and, finally, transitional legal pluralism.

5.1 Legal pluralism beyond the nation state

Surprisingly, Friedrich Carl von Savigny’s critique of codification from 1814 and Gunther Teubner’s ideas on global law from 1992/96 developed kindred approaches to legal pluralism. Both claimed ‘law without a state’: one devel-

oped a general private law without a German nation state, the other a global legal pluralism without a world state. The critique of general political legislation was common to both. Both trusted in science and in well-educated lawyers. Both the Historical School and the sociological jurisprudence shared the same spirit.²³⁷ That is why Savigny's and Teubner's theories of legal sources also corresponded in their reference to the people or the nation (customary and lawyer's law) on the one hand, and to social practices (contractual law) on the other. Both preferred an interlegal model of law and its application, and both did not call attention to their ideological preferences. In the end, both defended a liberal idea: the autonomy of law.

5.2 Legal pluralism in the nation state

At the turn of the 19th to the 20th century, Hans Kelsen described the fundamental change as follows: "All law is state law." State legal positivism had become the dominating mindset during the 20th century. In this new legal world of the 'delayed saddle time' of German jurisprudence, with the German Reich founded in 1871 and the German Civil Code from 1900, 'law without a state' took on a different meaning. There was no chance to dismiss state legal positivism and the codification of private law anymore. The German Reich and the German Civil Code were the fact, while they, of course, were subject to manifold critique. In this political, legal, and historical situation, Otto von Gierke, Eugen Ehrlich and Franz von Benda-Beckmann represent three ways of dealing with the state in legal thought. Gierke was a child of two worlds. He was an important legal thinker before and after the foundation of the German Reich and the enactment of the German Civil Code. It was easy for him to put the autonomous law of cooperatives next to the law of the state, though he had a strong bias toward the German nation state. He understood both realms as legally independent and autonomous. There was no need for a strong conception of interlegality. For Eugen Ehrlich, the situation was different. In the Bukovina, which represented the periphery of the Habsburg Monarchy, state law and the Austrian Civil Code of 1812 were far away. The new science of legal sociology paved the way for him to conceptualize the law of rural societies in the Bukovina. The 'living

237 For Teubner's sociological jurisprudence see SAHM (2017); SEINECKE (2019) 134–139.

law' that he found there exemplified his notion of 'law without a state'. The methodological battle cry of "Freirecht" (free law) then made interlegality possible for him. The 'living law' undermined and supplemented state law. Finally, somewhat surprisingly, Franz von Benda-Beckmann wrote his book on "Legal Pluralism in Malawi" from the perspective of state law. However, in the postcolonial legal world of Malawi, he reconstructed the interlegal integration of indigenous law into applicable state law.

5.3 Transitional legal pluralism

Gustav Radbruch and his essays concerning the arbitrary and unjust dictatorship of National Socialist Germany established a third tradition of pluralistic legal thought. Right after 1945, when the German jurisprudence was under shock as National Socialists had abused the German law, and, moreover, German lawyers and law professors had actively supported them, Radbruch directed his critique of state legal pluralism only against the glaring inequities of National Socialist dictatorship. He called for higher legal principles to serve as alternative law. But this law was no system of natural law. It offered judges a formula to correct and deal with the most blatant injustices and the despicable arbitrariness of the National Socialist German state. Radbruch's interlegality tried to balance the principles of justice and legal certainty. However, his greater goal was to reestablish the *Rechtsstaat* and democracy in post-World War II Germany.

5.4 Legal pluralism in German legal thought

This short story that highlights the prevalence of pluralistic legal thought in German-speaking contexts points not just to three traditions of legal pluralism. For it also offers insights into the diversity of legal pluralism and its four themes: law without a state, alternative law, interlegality, and nomos. The different approaches to 'law without a state' were strongly dependent on the political and legal situation in Germany. Before the foundation of the German Reich, 'law without a state' meant something altogether different than after 1871. Similarly, 'law without a state' acquired a different meaning at the end of the National Socialist dictatorship in Germany and, not least, for the political and legal situation in the world society after the end of the Cold War. Further, the alternative laws in German legal thought never were

utopian, for they accounted for the empirical or doctrinal realities. In the 19th century, Friedrich Carl von Savigny's Roman law was still applicable in principle. Otto von Gierke's autonomous statutes and Eugen Ehrlich's 'living law' referred to empirical legal orders at the end of 19th and in the beginning of 20th century. Franz von Benda-Beckmann analyzed the post-colonial and indigenous law in Malawi with more empirical methods. The source of Radbruch's higher principles was the "work of centuries" and, even more importantly, a judicial practice that established itself right after 1945. Finally, Teubner claimed the reality of a contractual practice in transnational law. These debates, however, did not necessarily connect the 'law without a state' to a concept of interlegality, even though most alternative laws were accompanied by it. Particularly for Gierke, cooperative statutes or customary laws existed in parallel to state law – without any kind of interaction. And in Ehrlich's theory, interlegality appeared more as a reflex to his methodological critique of codification. For the other German-speaking legal pluralists, however, interlegality was always central to their concept of law. This notion of interlegality also entailed the use of the common Roman law and the Canon law, the imperial and territorial law, the statutes and codifications, the religious, rural and indigenous law, the supra-statutory law, the global contract law and, finally, the socio-legal normativity. After all, legal thought in Germany was linked to different *nomoi*. In the 19th century, the most important one was the faith in nation with its manifold consequences – for codification or for the application of the German and Roman law in the German sovereign states. Other than that, scientific preferences for legal history or sociology, as much as legal principles like the *Rechtsstaat* or democracy, shaped these legal pluralisms.

This history of legal pluralism in Germany finally ends with an intriguing historical hypothesis: At the threshold of the 20th century, German legal thought had changed fundamentally. This transformation mainly concerned the fundamental concepts of law, legal sources, and science. In the new German nation state, the meaning of old concepts, like customary and lawyer's law, and especially legislated law and statute, had changed, and with the codification and the codification principle, statutes and codes received greater validity, while customary law lost its power. If this hypothesis also applies to a history of legal pluralism, it is because it makes clear why histories of legal pluralism usually locate the origin of the concept back in early 20th-century jurisprudence, e. g. with Eugen Ehrlich, Max Weber or

Otto von Gierke.²³⁸ In this epoch, the validity of non-state law was no longer self-evident. These early proponents of legal pluralism recognized alternative law as law – against the new dominance of codification and the proliferating law of the nation state.

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238 For the constructed histories in legal pluralism, see SEINECKE (2015) 60–61; SEINECKE (2018) 19.

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Monist or Pluralist Legal Tradition in 19th-Century Peru?

It is likely that Ralf Seinecke never imagined that a Peruvian scholar with a cursory knowledge of German legal theory would comment on his text or that his contribution would have a direct and significant impact on Latin American legal scholarship, particularly in the fields of legal history and legal pluralism. In my view, and in a positive turn of the law of unintended consequences, this is bound to happen when Latin American scholars realize how important pluralistic legal thought was for the iconic German legal thinkers they study, and sometimes worship. Hopefully, this will generate a chain reaction of reinterpretations and research aimed at reassessing the role of legal pluralism in the historical and contemporary configuration of Latin American law.

To comment on his contribution, I first refer to Seinecke's careful rendering of the central role pluralistic legal thought played in shaping the ideas of some of the most important German thinkers of the last two hundred years. I am not interested in rehearsing his main theses, but, rather, in highlighting some aspects that may be useful for exploring implicit pluralistic legal thought and its institutionalization in Latin America, particularly in Peru. Second, I stress the short circuit between legal history and legal anthropology, and mainly legal pluralism. Despite the calls for a rapprochement, the strong bias towards conflating legal pluralism with ethnic and cultural diversity hinders any fruitful dialogue between these disciplines. Thus, the different and conflicting regulatory regimes enforced throughout Peruvian modern history are neither presented nor theorized as exemplifying legal pluralism. Third, I offer some examples of the officially multiplex legal world that 19th-century Peruvians inhabited. Legal pluralism was not only a sociological reality acknowledged by the authorities but also a state-sanctioned normative and institutional multiverse, albeit unsystematic and conflictive, giv-

en the secular structural weakness of the modern Peruvian state.¹ It is only at the beginning of the 20th century, when centralization was accomplished in several legal fields, that official legal pluralism recedes and specializes on the ‘Indian question’. This development has led legal anthropologists and pluralists to make the false and reductionist equation between legal pluralism and ethnocultural diversity.² Finally, I conclude that in order to reassess the history of Peruvian law, it is important to take into account how central legal pluralism was to German legal scholarship. Legal historical and anthropological studies should coalesce in this inquiry.

1 German pluralistic legal thought

Against the backdrop of the Peruvian experience, there are three important reasons for writing a response to Seinecke’s essay. First, Seinecke provides an operational definition that is useful for delimiting his area of interest from cultural or political pluralism. Thus, as he puts it: “Legal pluralism juxtaposes different legal orders, conflicting jurisdictions, coexisting legislators, and competing concepts of law”.³ Second, his writing is located “in the field of history of science” – and focuses on jurisprudence – and not in “the political and institutional history or the history of applicable law”.⁴ Third, his thesis is that “the traditions of pluralistic legal thought never fully disappeared from German jurisprudence” and were a central issue for the German jurists of the 19th and 20th centuries, even if the legal pluralism of the Old Reich perished in 1806.⁵ If this is clearer during the period between 1806 and 1871 (year of the German unification) or towards 1900 (enactment of the BGB), the key point is that after such decisive steps towards political and legal centralization, legal pluralism was still a sociological reality that challenged German jurisprudence.

- 1 “In Latin America, generally speaking, both the state and the law have historically been quite weak [...] and the reach and capacity of the state, including its legality, remain extremely uneven across geographic and social divides”, HILBINK/GALLAGHER (2019) 37. The rule of law is still an unfulfilled promise.
- 2 I warned against this wrong equivalence back in 2001, but old habits die hard. See GUEVARA GIL (2009) 62.
- 3 See the contribution by Seinecke in this volume (118).
- 4 See the contribution by Seinecke in this volume (119).
- 5 See the contribution by Seinecke in this volume (119).

For exploring how German jurists have dealt with legal pluralism in different contexts and debates, Seinecke pays attention to four diagnostic elements: law without a state; alternative law; interlegality;⁶ and *nomos* (the normative universe we inhabit).⁷ Showing how important these issues were for prominent jurists like Savigny, Gierke, Kelsen, Radbruch, Ehrlich, F. von Benda-Beckmann, and for Teubner, he concludes that “the history of legal thought in Germany is replete with references to legal pluralisms” and identifies three types: “legal pluralism before and beyond the nation-state, legal pluralism inside the nation state, and, finally, transitional legal pluralism”.⁸ Savigny and Teubner represent the first one. Both defended the autonomy of law at different levels. Savigny “developed a general private law without a German nation state”, while Teubner proposed “a global legal pluralism without a world state”.⁹ Gierke, Ehrlich, and F. von Benda-Beckmann studied pluralism within the nation-state. Gierke “put the autonomous law of cooperatives next to the law of the state” and “understood both realms as legally independent and autonomous”. Ehrlich’s “living law” was a perfect example of ‘law without a state’ and F. von Benda-Beckmann “reconstructed the interlegal integration of indigenous law into applicable state law”. Lastly, Radbruch “called for higher legal principles as alternative law”, as a way to reestablish the rule of law and democracy after the brutal arbitrariness of the Nazi regime.¹⁰

It is fascinating to learn from Seinecke’s account that these scholars were not referring to a distant *topos Uranus*, where legal uniformity or diversity appeared as ideal types or abstract entities for their joyful speculation. On the contrary, they were reflecting on the significant legal, political and cultural changes affecting their social and intellectual worlds, their *nomoi*. Thus, we learn that “[i]n the 19th century, Friedrich Carl von Savigny’s Roman law was still applicable in principle” and that Otto von Gierke’s cooperative autonomy statutes and customary law or Eugen Ehr-

6 Interlegality includes “the common Roman law and the Canon law, the imperial and territorial law, the statutes and codifications, the religious, rural and indigenous law, the supra-statutory law, global contract law and, finally, the socio-legal normativity”. See the contribution by Seinecke in this volume (169).

7 See the contribution by Seinecke in this volume (124).

8 See the contribution by Seinecke in this volume (166).

9 See the contribution by Seinecke in this volume (166–167).

10 See the contribution by Seinecke in this volume (167–168).

lich's "living law" referred to empirical legal orders at the end of the 19th and [...] the beginning of the 20th century".¹¹ Similarly, Radbruch identified higher principles from the "work of centuries" but also from the alternative judicial practice developed after 1945, while Benda-Beckmann studied how indigenous Malawi law was turned into applicable state law, and Teubner "claimed a reality of contractual practice in transnational law" as the building block of a global legal pluralism.¹² These earthly concerns were, precisely, the solid foundations of their long-lasting contributions.

The lesson of this sustained intellectual enterprise for the historical and anthropological study of legal diversity in 19th-century Peru, and beyond, is clear and sound. We cannot foreclose our research agenda on legal pluralism just because we assume legal centralization was triumphantly underway immediately after the collapse of the Spanish empire, or because some influential scholars wrongly assume that the only cause of legal pluralism is ethnic difference or cultural diversity. We have to look for it not for ideological but for scientific reasons – even if "the validity of non-state law was no longer self-evident" and despite "the proliferating law of the nation state".¹³

2 A disciplinary short circuit

There seems to be a widespread consensus about a monumental change in 19th-century legal domain.¹⁴ As K. Benda-Beckmann and Turner have put it, before that period, legal pluralism provided the "condition of possibility" for pre-modern empires" and was a key building-block of the "normative logic of statehood", both for empires and colonial states. However, with "the establishment of nation states and ideologies that canonized the state-people nexus in the nineteenth century, the prevalence of legal pluralism came to be seen as problematic". In light of this exclusionary view of 'the nation',

11 See the contribution by Seinecke in this volume (169).

12 See the contribution by Seinecke in this volume (169).

13 See the contribution by Seinecke in this volume (170).

14 For example, BENTON/ROSS (2013) 8, describe "a long 19th century turn away from jumbled jurisdictions to the imagination of a more hierarchical and streamlined administrative order"; and DECOCK (2017) 103, portrays a movement from legal pluralism "to the culture of 'legal monism' or 'legal absolutism' consecrated by the codification movements in the nineteenth and twentieth centuries".

“emerging nation states sought to eliminate all traces of legal pluralism in domestic legal ideology”, though de facto legal pluralism continued to operate in Western countries and their colonial domains.¹⁵ This claim, circumscribed to the ideological realm, needs to be tested against the jurisprudential multiverse of that century. The reason is that ethnic or national identity is not the only source of the multiplex normative and institutional frameworks in force in modern nation states.

A similar narrative has become standard and commonsensical in Latin American legal anthropology. Its prevalence blocks the way for a fruitful dialogue with legal history and prevents the diachronic study of non-ethnic legal diversity.

For example, Mark Goodale, a renowned legal and Latin American anthropologist, stresses that legal pluralism is not an issue that deserves historical scrutiny in the region. His point is that the theoretical and ethnographic explorations of legal pluralism were undertaken in other parts of the world “because ‘official’ legal pluralism was never adopted either during the colonial era, or by the newly independent nation states”.¹⁶ Thus, in Latin America, “de jure legal pluralism was never prevalent, because colonial governments – and the nation-state after independence – were never able to create unified, but multiple, legal orders as part of wider strategies for social and political control”. In his monist interpretation, “After the conquest, ‘law’ became by definition ‘state law’”, although he admits to the existence of a de facto legal pluralism.¹⁷

Rachel Sieder, another very influential and respected legal anthropologist, shares this view, but with a historical caveat. For her, “In Latin America, Spanish colonial rule was [...] characterized by hierarchical and racialized legal pluralism (the *Leyes de Indias*)”. Contrary to Goodale, she acknowledges an “officially sanctioned legal pluralism involving distinct legal jurisdictions and codes for different racial, ethnic, or religious groups”.¹⁸ In the 19th century, the newly founded republics abrogated the de jure legal pluralism that made up the colonial legal framework and imposed a monist model “sub-

15 BENDA-BECKMANN/TURNER (2018) 256. They are referring to the colonial worlds of Asia, Africa and Oceania.

16 GOODALE (2008) 217. Italics added.

17 GOODALE (2008) 218.

18 SIEDER (2019) 52.

jecting native peoples to Liberal laws, which rejected recognition of cultural difference and promoted assimilation in theory at the same time as they reproduced exclusionary racial hierarchies in practice”.¹⁹ Under state law monopoly, indigenous normative systems were marginalized or criminalized. “Yet despite the absence of *de jure* legal pluralism, in many countries, a *de facto* form of indirect rule came to characterize relations between states and indigenous peoples”, creating long-lasting interlegal normative and institutional arrangements such as Mexican *ejidos* or Andean peasant communities.²⁰ This *de facto* legal pluralism is at the core of the new Latin American constitutionalism since the late 1980s. For Sieder et al., the recognition of indigenous peoples’ rights and the call for multicultural and plurinational states represent “*a radical break with monist republican traditions*”.²¹ Apparently aware that Latin American modern law was not as monolithic as they assert, Sieder and her coauthors recognize the “need for more long-run historical analyses and debate with historians of law and society in Latin America”.²²

Finally, Yrigoyen, a Peruvian prominent lawyer and activist in the field of indigenous peoples’ rights, shares and spreads this unsubstantiated assertion: “The liberal States of the nineteenth century were organized under the principle of legal monism.” In her view, “[t]he monocultural nation-State, legal monism, and a model of citizen suffrage (for white, illustrious, property-owning men) formed the backbone of the horizon of [monist] liberal constitutionalism” predominant in that century.²³

The problem with this kind of simplistic explanations of decades of complex legal, social, and historical processes is that they overlook important nuances and intricacies: For example, the “archipelago of communities”²⁴ fostered by liberal ideology in 19th-century Latin America, the discrete temporal viscosity within each legal sphere, or the enduring effectiveness of the

19 SIEDER (2019) 52.

20 SIEDER (2019) 52.

21 SIEDER et al. (2019) 6. Italics added.

22 SIEDER et al. (2019) 17. VALVERDE (2014) also calls for overcoming the disciplinary divisions between legal historians, geographers, and anthropologists when studying spatio-temporal assemblages.

23 YRIGOYEN (2015) 157.

24 LEVRAU/LOOBUYCK (2018) 4.

Spanish *Derecho Antiguo* (colonial laws and fora). And, as lawyers know very well, the devil remains in the details.

3 19th-century Peru: A multiplex legal world

In the Peruvian case, the focus cannot be on jurisprudence alone, which is at the center of Seinecke's study, for it must also be directed to the normative and institutional dimensions of the law. This is in no way a derogatory statement. Brilliant legal minds, such as Lorenzo de Vidaurre (1773–1841), José Silva Santisteban (1825–1889), José Toribio Pacheco (1828–1868), Francisco García Calderón (1834–1905), Manuel Vicente Villarán (1873–1958), and other jurists studied by Carlos Ramos and Fernando de Trazegnies, were very active in the 19th century.²⁵ The simple reason why such comparison is impossible on the plane of jurisprudence alone is that in Peru no comparable school of thought developed on the issue of legal pluralism as such well into the 20th century.²⁶ Moreover, as Ramos states, “the image of a full time legal scholar completely devoted to academic reflection was unthinkable in 19th-Century Peru”.²⁷ They worked as judges, lawmakers, and lawyers, or acted as politicians and even conspirators siding with warring caudillos. This is why republican codes were prepared by commissions and not by single jurists like Andrés Bello in Chile, Dalmacio Vélez Sarsfield in Argentina, or Augusto Texeira de Freitas in Brazil.²⁸ In addition, this is also why a radical break from the *Derecho Antiguo* was more difficult. Their legal knowledge was embodied, embedded, and enacted in their daily practice as socio-legal agents, which, at the same time, was deeply rooted in an old legal nomos that proved very difficult to eradicate by the new legal universe.²⁹

25 RAMOS (2000, 2001, 2002, 2003); TRAZEGNIES (1979). See, for example, PACHECO (2015 [1854]); SILVA SANTISTEBAN (2015 [1856]); GARCÍA CALDERÓN (1879); VILLARÁN (1998 [1915–1916]).

26 GÁLVEZ (2015) provides the best account of the history of legal anthropology and legal pluralism in Peru. Fernando de Trazegnies, Francisco Ballón, Ana Teresa Revilla, Patricia Urteaga, and Jorge Price stand out as pioneering and original scholars in these fields.

27 RAMOS (2001) 44.

28 RAMOS (2001) 44–45; RAMOS (2000) 46; RAMOS (2003) 37–40.

29 For the notions of embodied, enacted and embodied knowledge, see ZILBERSZAC (2019).

The Peruvian jurists I mention conceived their books or codification projects as bricolages that show clear traces of legal pluralism and the tension between the old and new ideas about the law. For example, Manuel Lorenzo de Vidaurre, a graphomaniac by all accounts, published drafts of criminal (Boston, 1828), ecclesiastical (Paris, 1830) and civil codes (Lima, 1834–1836).³⁰ In the first one, crimes were sanctioned following the Hispanic legislation, including infamous punishments and penalties applied by the inquisition. Vidaurre’s doctrinal and normative sources were *Las Siete Partidas* (1256–1265), the glosses of Gregorio López (1555), and the *Nueva Recopilación* (1567). Thus, his claim that the Enlightenment inspired his work does not hold.³¹ In a similar way, his draft of a Civil Code is a contradictory composite. While proclaiming liberal values, the project envisaged the extension of slavery until 1870; or, while declaring that liberal property shall prevail over all forms of entailed dominium (e.g., *censo reservativo*, *consignativo*, *enfiteútico*; see below), the draft abolished the first two but kept in place the emphyteusis and *capellanías* (endowments for masses for the salvation of a soul). Overall, this project is based on the *ius commune* developed in Castilian law, in particular in *Las Partidas*, the glosses of Gregorio López, and the “docto Cobarrubias”, but also grounded on the Enlightenment and rationalist philosophy for the parts on marriage, contract and property law (with the exception noted).³²

On his part, José Toribio Pacheco wrote an interesting book on the history of Peruvian constitutional law based on the 1839 Constitution. He was convinced that the “real constitution of a nation dwells in the customs and habits of the people”. Unfortunately, in his view, “a large part of the Peruvian population remains mired in gross ignorance, possessing only, if at all, animal instincts”. The political and social problems facing mid-19th-century Peru were not due to the new system of government adopted but had to do with “the character and customs of its people”. Under this mindset, he opposed recognizing political rights to indigenous people. “An Indian who has turned 25 years old next to his llamas, only having access to their instincts, is a citizen, is a fraction of the sovereign, and has a vote in munic-

30 RAMOS (2000) 163, 198, 216.

31 RAMOS (2000) 169–183.

32 RAMOS (2000) 228–268.

ipal elections.” Only literate persons should hold the right to vote and become part of the nation. Yet, he believed that legal engineering could change the “customs of the masses”, slowly and incrementally.³³ In particular, law had a civilizing mission towards the indigenous population still following their instincts and, at most, their barbaric customs.

In the field of personal law, Pacheco observed that foreigners were subject to the laws of their homelands, while their property rights in Peru were subject to Peruvian law. This dual jurisdiction created problems for determining their legal age for signing valid contracts concerning their property rights. He also noted that the legal age for civil matters in case of emancipated persons was reduced to 21 years, while the legal age for political rights was invariably set at 25 years. This created an unfair and contradictory dual regime that put these persons under two legal temporalities (see below).³⁴

Another jurist, José Silva-Santisteban, identified some elements of legal pluralism in 19th-century constitutional texts, particularly in the 1860 Constitution, but did not reflect on their relevance for the formation and operation of the legal system. He shows, for example, the different jurisdictions that were simultaneously at work, such as the ecclesiastical, military, treasure or miner’s tribunals, the merchant’s guilds, the Justices of the Peace, and the printing juries for libel cases.³⁵ He was adamantly against the recognition of personal jurisdictions (*fueros personales*), but in favor of granting special fora (*fueros reales*) to particular groups of persons such as priests or militaries. Even in this case, he thought they should be judged under national laws and courts “in everything they practiced as men or citizens”.³⁶ His liberal ideology also led him to question the social life of entailed property and welcomed its abolition in the 1860 Constitution.³⁷

In his monumental *Diccionario de la Legislación Peruana*, Francisco García Calderón carefully registered and defined all the imaginable words referred to the legal multiverse of his time. His objective was to offer a clear and “full picture” of “all the laws and decrees included in our codes” because the string of laws and subsequent repeals since independence had produced

33 PACHECO (2015 [1854]) 92, 95, 110, 120, 172.

34 PACHECO (2015 [1854]) 164–168.

35 SILVA SANTISTEBAN (2015 [1856]) 257, 384.

36 SILVA SANTISTEBAN (2015 [1856]) 265–266, 304.

37 SILVA SANTISTEBAN (2015 [1856]) 304.

“chaos and darkness”. For this, he dissected the national codes and legislation of the young republic and, aware of their validity and importance, of relevant parts of *Las Siete Partidas* (1256–1265), the *Nueva Recopilación de Castilla* (1567), the *Recopilación de las Leyes de Indias* (1680) and the royal decrees (*cédulas reales*) compiled by Matraya Ricci in his *El Moralista Filalético Americano* (1819).³⁸ His entries for property and entailed forms of property, special jurisdictions (ecclesiastical, mining, trade, military), classification of persons, family and inheritance law, among other legal domains, are indispensable for understanding Peruvian law. Although he did not analyze them as pieces of the puzzle of legal pluralism, his work is a crucial source for understanding the laws, doctrines, and *nomoi* of 19th-century Peru.³⁹

Finally, Manuel Vicente Villarán also provides some hints about legal plurality in his study of constitutional law. For example, he discussed the right to vote granted to indigenous people. He argued that even illiterate Indians could and should vote because most of them paid taxes, owned a workshop, or possessed land. Thus, they could resort to different legal grounds to exercise this right. In his political imagination, as opposed to that of Pacheco, they were part of the nation, and rightly so. He also favored trials of military personnel and priests in state courts for ordinary offences but acknowledged the need to keep their special jurisdictions due to their differentiated social roles. In this regard, Villarán carefully studied the prosecution of crimes committed by the president or his ministers. For the president, the senate was transformed into a chamber of justice that decided if he was to be judged by the Supreme Court.⁴⁰ It is clear that he noticed the operation of different forms of justice but did not conceive them as cases of legal pluralism.

Despite the importance of these works, they do not form a robust doctrinal corpus comparable to German jurisprudence concerned with legal pluralism. This is why I have selected legislation as the main field for observing this issue. Even though I use different sources, Seinecke’s account of 19th-century German jurists’ debates is very useful to reassess the links between liberalism and legal pluralism for that same period in Peru.

38 GARCÍA CALDERÓN (1879), vol. I, VII–VIII.

39 See his dictionary in the two volumes and a supplement: GARCÍA CALDERÓN (1879).

40 VILLARÁN (1998 [1915–1916]) 552–574, 668–699.

If it is clear by now that the Spanish empire was not an absolutist polity but a *composite monarchy*⁴¹ that was the epitome of legal pluralism⁴² in terms of its conflictive normative diversity and institutional complexity, there is still a tendency to think that the new liberal republics were obsessed, *ab initio*, with legal standardization and centralization. An influential historian like Jorge Basadre, for example, offers an evolutionist account of the history of law in 19th-century Peru: colonial law was followed by a period he calls Intermediate Law (*Derecho Intermedio*, 1821–1852) – fractured and influenced by French and Spanish Law – and all the remaining decades were dedicated to homogenize and unify the law.⁴³ While he offers counterexamples challenging his own narrative, pointing to the enduring judicial and contractual use of colonial law,⁴⁴ the impression is that the struggle against legal pluralism was a *raison d'être* of the new republic.

However, this might not be the case. António Manuel Hespanha reminds us that “19th-century liberalism proposed and promoted a policy of multiplying the sources of government of society – *governance* as opposed to *government*”.⁴⁵ As such, liberalism was a breeding ground for legal pluralism, not the contrary, and this explains why alternative jurisdictions, legislations and *nomoi* were officially recognized and fully enforceable until the 20th century. For sure, this trend was also rooted in Spanish American *constitucionalismo jurisdiccionalista* (i. e., Cádiz 1812) which, in turn, derived from a long-standing political culture, in which multiple authorities had the power to declare the law (*iurisdictio*) in a preordained and natural order.⁴⁶

Furthermore, by mid-19th century, most Latin American countries were experiencing a rapprochement of liberal and conservative forces. Fearful of “anarchy and unbridled majoritarianism”, they devised constitutions and legislation aimed at the “counter-majoritarian organization of power that

41 YUN-CASALILLA (2019).

42 BENTON/ROSS (2013).

43 BASADRE (1984) 358–360; see RAMOS (2003) 28. For a critique of the state as the protagonist of 19th-century legal history, BASTIAS (2018) 325.

44 BASADRE (1984) 383–398; TRAZEGNIES (1991, 2008). RAMOS (2003) 168–260, also shows a myriad of cases in which colonial laws and institutions remain alive along the century.

45 HESPANHA (2019) 23. See MORELLI (2007) 134.

46 On jurisdictional constitutionalism, GARRIGA/LORENTE (2007) 19; on the jurisdictional conception of political power, see GARRIGA (2007) 59–65; BASTIAS (2018).

concentrated authority in the Executive and cemented elitist measures of selection for both senate and judiciary”.⁴⁷ A case in point is the 1860 Peruvian Constitution.⁴⁸ This “peculiar model of (unbalanced) checks and balances, which wanted to combine the Spanish monarchical/conservative model with the liberal model of the United States”⁴⁹ created a normative framework full of “complexities, confusions, and conflicts within ‘state law’” that, in the end, fostered legal pluralism.⁵⁰

In Seinecke’s exploration of German jurisprudence, there is no mention of the issue of temporal legal pluralism, which, I think, is critical to understanding the workings of the law in different periods.⁵¹ Similar to definitions that emphasize spatial synchronicity, it can be characterized as “the coexistence, in the same place and at the same time, of different and sometimes incommensurable [normative] temporalities”.⁵² As Valverde points out, “clashes between legal traditions with different epistemologies often involve fundamental differences about the relation between law and temporality”.⁵³ But what is less appreciated “is that one and the same ‘culture’ can easily contain conflicting temporal and spatial logics, and that those conflicts are not necessarily zero-sum games in which a ‘dominant’ spatiotemporality drives out older or less prestigious ones”.⁵⁴

Despite the standard evolutionist narrative already mentioned, this is a more accurate rendering of the history of Peruvian law, in which “multiple and conflicting temporalizations of law clearly coexisted throughout nineteenth-century legal thought” and practice.⁵⁵ In fact, legal change acquired different rhythms in 19th-century Peru. Observing these discrete timeframes, Foucault concluded: “each transformation may have its particular index of

47 GARGARELLA (2019) 27.

48 VILLARÁN, (1998 [1915–1916]) 565; CARPIO/PAZO (2016) 40.

49 GARGARELLA (2019) 28. See VILLARÁN (1998 [1915–1916]) 571.

50 BENTON/ROSS (2013) 4.

51 It remains to be seen how German legal scholarship dealt with temporal legal pluralism, but at least FRANZ and KEEBET VON BENDA-BECKMANN have addressed it. See, for example, BENDA-BECKMANN (2001); BENDA-BECKMANN/BENDA-BECKMANN (2014a, 2014b).

52 VALVERDE (2014) 62. In general, MECCARELLI/SOLLA SASTRE (2016) 20, define temporality as “the coexistence of diverse temporal conditions in the historical-legal experience”.

53 VALVERDE (2014) 62. ENGEL (1987) provides clear anthropological examples. Also, GREENHOUSE (1989).

54 VALVERDE (2014) 62.

55 VALVERDE (2014) 64. Also, GREENHOUSE (1989) 1636.

temporal ‘viscosity’.”⁵⁶ Jurisdictional autonomy, for example, “implies the constitution of particular temporalities intrinsic to the system”,⁵⁷ not only vis-à-vis other systems (political, economic) but also within the legal system. In general, “problems will inevitably surface when legal orders following discordant temporal logics operate in relation to one another.”⁵⁸ Thus, besides the weight of the old legal *nomos* and the functional role of legal pluralism in the liberal project, temporal plurality is one of the reasons why legal centralization and monopolization proceeded in slow motion and were accomplished, *de jure*, only at the beginning of the 20th century. Even today, the ethnographic record shows that “the abstract, linear and divisible time familiar to European modernity is at variance with differently conceived *temporalities*.”⁵⁹

A research agenda inspired by this insight would offer an opportunity to counterbalance the overwhelming spatialization of legal pluralism in Peru and elsewhere.⁶⁰ Franz and Keebet von Benda-Beckmann remind us that anthropology of law is fraught with spatial metaphors.⁶¹ This mode of imagining legal pluralism tends to block our understanding of the relevance of “less spatial forms of jurisdiction”, such as the spiritual or the personal fora for militaries, miners and merchants, that remain so prevalent and persistent.⁶² In this multiverse, persons were subject to the demands of competing jurisdictional and normative frameworks, each one with its particular spatiotemporal and categorical regimes for framing social relations.⁶³ It is in this sense that we need to “consider the time element as an inner feature of the legal problem in hand”, with critical consequences on its nature, scope, and progression.⁶⁴

56 ORTIZ (1989) 33. The quote is from FOUCAULT (1979) 294.

57 BASTIAS (2018) 330.

58 BENDA-BECKMANN / BENDA-BECKMANN (2014b) 21.

59 COSTA (2016) 46.

60 The solution is to focus on the *chronotope*, the way in which legal “time and space interact and shape each other” and how, in plural contexts, this dynamic creates “conflicting spatialtemporalities”, VALVERDE (2014) 67, 71.

61 For example, “‘semi-autonomous social fields’ (Moore 1973), ‘rooms’ and ‘landscapes’ (Galanter 1981, 1983), ‘structural places’ (Santos 1985), and the ‘external-internal’ (Kidder 1979)”, BENDA-BECKMANN / BENDA-BECKMANN (2014a) 47, note 3.

62 VALVERDE (2014) 63. On the external ecclesiastical Catholic jurisdiction and the sacramental jurisdiction of the soul, the “court of conscience”, see DECOCK (2017) 107.

63 BENDA-BECKMANN / BENDA-BECKMANN (2014a) 35–43.

64 MECCARELLI / SOLLA SASTRE (2016) 19.

For example, clerics lived in a time out of time, in a segregated space and enjoyed special jurisdiction. They could only profess at twenty-five years of age, notwithstanding the fact that civil adulthood was set at twenty-one. Regular clergy could not live outside their convent, unless they obtained license from their superiors and notified civil authorities; and they had to give up their belongings when professing.⁶⁵ Although they were alive, they did not have the right to write a will, receive an inheritance, or sign contracts, unless or until secularized, in which case they recovered their civil rights and overcame civil death.⁶⁶ The reasoning for that is that the body invested with a sacred persona was legally removed from secular affairs and subject to a particular normativity.

Terms are also a good example of differential experiences of time. The 1852 Civil Procedure Code established discrete deadlines and completion terms for trials and proceedings. These terms were suspended due to two patriotic holidays (July 28th and December 9th) and two court recesses for Christmas and Easter celebrations. Terms could also be extended, according to a time-space scale (*término de la distancia*) if the defendant found himself more than three leagues away from the court.⁶⁷ This way of establishing the terms was at odds with the manner prescribed by the 1853 Commercial Code for trade contracts: “In all computations of days, months and years, it shall be assumed a day of twenty-four hours, the months according to the Calendar, and a year of three hundred sixty five days.”⁶⁸ Or, with the stipulations set out in article 1557 of the 1852 Civil Code: “The rural year is counted in each place and for each kind of estate starting from the time that, according to the nature of the crop, it is customary to receive them in leasing.”⁶⁹ Thus, legal personae experienced the flow of time in different ways and with different consequences, depending on the forum in which they were acting. Temporal plurality, born out of legislation or contractual

65 CÓDIGO CIVIL DEL PERÚ (1852), articles 12, 83, 87, 88–91, 94.

66 CÓDIGO CIVIL DEL PERÚ (1852), articles 685.4, 709.6. See TRAZEGNIES (2008) 265–266; SILVA SANTISTEBAN (1856 [2015]) 331.

67 CÓDIGO DE ENJUICIAMIENTOS EN MATERIA CIVIL (1852), articles 447, 455–457. For example, the term was extended by four days if the defendant was six or less leagues away. And one more day was added for each six leagues.

68 CÓDIGO DE COMERCIO DE LA REPÚBLICA DEL PERÚ (1853), article 198.

69 CÓDIGO CIVIL DEL PERÚ (1852), article 1557.

obligations as in the case of three life-long emphyteusis, also characterized this entangled legal world.

Now I turn to the institutional and normative dimensions of 19th-century Peruvian law. As for the multiple fora in force, the Civil Procedure Code of 1852 provides several hints of the complex legal world 19th-century Peruvians inhabited. First, besides the ordinary jurisdiction, it recognized the workings of the following courts: The Seven Judges Tribunal,⁷⁰ the War Seizures Tribunal (*Juzgado de Presas*), Water Tribunals, the Merchant's Guild, the Mining Tribunal, the Tithes Tribunal, the Catholic Ecclesiastical Jurisdiction, a Military Tribunal, a Customs, Tax and Seizures Tribunal, and private arbitration.⁷¹ Additionally, the code prescribed that the Mining, Merchant, Custom, Tax and Seizures, and War Seizures Tribunals would “proceed according to their special laws” and shall only subsidiarily follow the ordinary ones.⁷² These provisions did not affect the Ecclesiastical, Tithes or Military Tribunals, and it is highly unlikely that the Water Tribunals adapted their procedure to the code, given their strength and high degree of specialization. Thus, in fact, with the exception of the Seven Judges Tribunal, special jurisdictions kept their rules in place. Interestingly, sixty years later, De la Lama portrayed a similar jurisdictional patchwork, including printing juries for libel cases and Justices of the Peace.⁷³

As for the normative frameworks, we have to keep in mind that codification is a mirror image of officially sanctioned legal pluralism. Thus, the validity of Spanish colonial law and fora, well into the 19th century, can be derived from the dates of promulgation of the main republican codes as well as from its contents. Codification was not only a systematic normative innovation. It was also a matter of pouring old wine into new wineskins. I hope it will become clear that, contrary to mainstream narratives on legal centralization, *the recognition of normative and jurisdictional pluralism was part and parcel of the construction of Republican law.*

70 A special chamber appointed by Congress to determine the legal responsibilities of higher state officials. See ESCOBEDO (2016) 166, footnote 120.

71 CÓDIGO DE ENJUICIAMIENTOS EN MATERIA CIVIL (1852), articles 11, 12, 57.

72 CÓDIGO DE ENJUICIAMIENTOS EN MATERIA CIVIL (1852), articles 1821, 1822.

73 LAMA (1907) 9–10; ESCOBEDO (2016) 123–128.

Along this process, Peru, during its first century or so as a nation-state, issued several codes with the imprint I just mentioned: the Civil and the Civil Procedure Codes in 1852; the Commercial Code in 1853; the Criminal and Criminal Procedure Codes in 1862; and the Mining and Water Codes in 1901 and 1902. At the beginning of the 20th century, the country started replacing the first republican codes. In 1902, a Commercial Code was promulgated; in 1912, a Civil Procedural Code; in 1920, a Criminal Procedural Code; in 1924, a Criminal Code; and in 1936, a Civil Code.⁷⁴

Early on, Peru's two *Libertadores* attempted to provide new laws for the new republic that had been declared independent in 1821 by Jose de San Martin and finally freed from the Spanish and monarchist forces by Simon Bolívar in 1824. The former attempted to issue a new body of laws to replace the old and countless norms that could be traced back to the *Fuero Juzgo* (1241), *Las Partidas* (1256–1265), and the *Recopilación de las Leyes de Indias* (1680).⁷⁵ Bolívar commissioned the drafting of a Civil and a Criminal Code to a group of jurists.⁷⁶ But political turbulence forestalled their mission.⁷⁷ Another ruler, Marshal Andres de Santa Cruz, as part of his attempt to unite Peru and Bolivia, issued Civil, Criminal and Judicial Procedural Codes in 1836. But he had to put them on hold in 1838 due to the fierce opposition his government faced. As a result, “the laws and decrees in force before their promulgation keep all their strength and vigor”, which meant the reestablishment of colonial legislation.⁷⁸ It is important to stress here that this first republican codification experiment was an adaptation of the Napoleonic Code that included “Castilian law of las Siete Partidas [1256–1265], las Leyes de Toro [1505] and the Novísima Recopilación [1805]”.⁷⁹

The Civil Code of 1852 is another example of pouring old wine into new wineskins. It is clear that while it followed the Code formally, in essence, it

74 BASADRE (1956) 393.

75 RAMOS (2000) 230. See ORTIZ (1989) 49.

76 Dictatorial decree issued in Lima, January 31, 1825, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1825009.pdf>.

77 BASADRE (1984) 327.

78 Quoted in RAMOS (2001) 102. Months earlier, a similar step to restore colonial law was taken by President Luis José de Orbegoso, Lima, July 31, 1838, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1838027.pdf>.

79 RAMOS (2001) 143.

adhered to Las Siete Partidas de Alfonso X (1256–1265) and the Novísima Recopilación (1805).⁸⁰ It has been called a “condensation of common law” (*Derecho Común*) because it epitomized the “Roman Law and the *Ius Commune* of medieval and Spanish jurists”.⁸¹ Bravo Lira suggests that it shares similarities with Spanish pragmatic literature like the *Febrero Novísimo de Tapia*, published in 1828, but, in fact, it is representative of colonial law.⁸²

Several institutions represent the deep historical roots that, in turn, reflect the socially stratified Peruvian society. Going by Henry Sumner Maine’s famous aphorism – “the movement of the progressive societies has hitherto been a movement *from Status to Contract*” (1861) – Peru was by no means a progressive society. The vernacularization of modern liberal law stood in great tension with a legal corpus and a social structure that closely resembled that of the *Ancien Régime*. This created a normative pluriverse full of contradictions and alternative legal fields that contested the policy of legal centralization. For example, “the book on personhood, based on Roman, Canonical and Castilian laws, adopts from the outset a status-based stand”.⁸³ As already mentioned, clerics enjoyed a special status and jurisdiction with different time, space and behavioral regulations, including one that kept them under civil death, with no property or contractual rights, while remaining a sacred person. The code also provided a channel of communication between the secular and ecclesiastical spheres. To obtain dispensations, pardons, or graces, from the papacy, the clergy and their superiors had to go through “the Supreme Government”.⁸⁴ By far, the most important one was the centuries-old *recurso de fuerza*, a legal remedy granted to anyone who claimed their rights were being violated by “the excesses and abuses of ecclesiastical judges”. In these cases, they could seek redress by filing a claim before the Superior Courts of the republic.⁸⁵

80 RAMOS (2001) 35.

81 RAMOS (2001) 268.

82 RAMOS (2001) 268. The reference is to the *Librería de Escribanos*, published originally by José Bermúdez Febrero in 1772 and annotated (*adicionado*) by Eugenio de Tapia, RAMOS (2000) 126.

83 RAMOS (2001) 281. For a comparison of the influences of the Code and the *Febrero*, see TRAZEGNIES (2008) 258–260.

84 CÓDIGO CIVIL DEL PERÚ (1852), article 92.

85 CÓDIGO DE ENJUICIAMIENTOS EN MATERIA CIVIL (1852), articles 1763–1783. See GARCÍA CALDERÓN (1879) II, 1631–1632; ORTIZ (1989) 51.

The legal classification of persons included slaves.⁸⁶ Although slavery was abolished two years after the promulgation of the Civil Code (1854), the inclusion of this category reveals the endurance of old laws and customs in which normative pluralism was predominant, given the power conferred on the masters to organize and rule the lives of their slaves. Besides, it took decades to abolish it. Worst of all, slavery was replaced by other forms of radical subordination. These created semi-autonomous social fields that removed workers from the ambit of state law protections. Between 1849 and 1874, more than one hundred thousand Chinese immigrants traveled to Peru under servile conditions that had been agreed upon in indentured contracts (*contrata chinera*), and thousands of indigenous peoples and peasants were sent to mines, haciendas, and plantations under *contratos de enganche*, which in the end indebted and impoverished them.⁸⁷ These contracts were not included in the Civil Code but were subject to administrative regulations.⁸⁸

Marriage was also a clear example of interlegality and recognition of a traditional normative framework that far exceeded the short life of the new liberal contractual order: “Marriage is celebrated in the Republic following the formalities established by the Church in the Council of Trent.”⁸⁹ However, the Catholic Church did not exercise a jurisdictional monopoly over marriage. Ecclesiastical courts adjudicated cases of annulment and canonical divorce; civil judges dealt with disputes over betrothal, alimony, childcare, legal fees, and return of properties; and criminal courts resolved cases of adultery, injuries and offences.⁹⁰ In the social world, both secularization and the flow of non-Catholic migrants – the feared *Lutherans* – weakened the Catholic-inspired normative grip over marriage. Trazegnies presents a case in which a former priest wished to marry an Evangelical Protestant who was a minor. Against the opposition of the state official in charge of protecting minors, a judge ruled in favor of the marriage. In his liberal interpretation,

86 CÓDIGO CIVIL DEL PERÚ (1852), articles 95–110.

87 On Chinese migration and *contrata chinera*, TRAZEGNIES (1994). On *enganche*, TRAZEGNIES (1991); RAMOS (2006) 69–152. On the legal road to abolish slavery, RAMOS (2006) 17–67.

88 “The codes did not take the trouble to address such an unpleasant aspect of reality”, RAMOS (2001) 45.

89 CÓDIGO CIVIL DEL PERÚ (1852), article 156. See TRAZEGNIES (2008) 264–265.

90 CERVANTES BEGAZO (2018) 32.

neither of them was Catholic: she was Protestant and he was an apostate with no ties to the church because civil legislation had abrogated the validity of perpetual vows or ties (*vinculaciones*). Besides, their children would not be deemed sacrilegious because the groom was an apostate.⁹¹ By the end of the century, a dual legal model was sanctioned. In 1897, Congress passed a law allowing the marriage of non-Catholics, including inter-confessional couples, before provincial mayors, which opened the path for civil marriage.⁹²

Property relations are another field in which the Civil Code offers examples of diverse regulatory regimes operating simultaneously and at odds with the liberal precepts of the Napoleonic Code that attempted to merge ownership rights. In addition to the typical form of consolidated liberal property, the code regulated three forms of dismembered ownership. These were the *censo enfiteútico*, *reservativo*, and *consignativo*. All were based on the distinction between *dominium directum* (ownership) and *dominium utile* (possession, use and enjoyment). In the *censo reservativo*, the owner transferred both kinds of dominium in return for a fee. In the emphyteusis, a long-term contract that was valid for up to three generations (*tres vidas*), only the *dominium utile* was transferred in exchange for an annual payment (*canon*). Finally, in the *censo consignativo*, the owner retained both and received a capital, in return for which he had to pay a *renta* (interest on loan) to his lender.⁹³ This entanglement of rights and duties unleashed a constellation of social, economic and legal relations that were not only framed by the Civil Code but also by customs, long-term contracts of up to 150 years, and even *ad perpetuam* entailments. It took decades to dismantle this alternative regulatory regime. Only the new Civil Procedure Code of 1912, which included provisions to consolidate property rights expediently, “finished the long history of unentailing property in Peru.”⁹⁴

It is interesting to observe that the Civil Code was conceived as the flagship of normative monopolization, including legal reasoning, as if a whole and enduring legal culture could be effaced from the new *nomos* by fiat lux. In 1849, President Ramón Castilla promulgated a law prescribing how the

91 TRAZEGNIES (2008) 266–267.

92 CERVANTES BEGAZO (2018) 33–34; RAMOS (2006) 299–317.

93 See CÓDIGO CIVIL DEL PERÚ (1852), articles 1885–1920; GARCÍA CALDERÓN (1879) 1, 380–387; RAMOS (2001) 303–309; TRAZEGNIES (2008) 261–262.

94 RAMOS (2001) 309; BASADRE (1984) 380.

code was to be interpreted. Among other measures to ensure the proper use of the new legislation, the law stated: “Once the new codes [Civil and Civil Procedure] are enacted, it is absolutely forbidden, under pain of nullity and liability, to base decrees, judgements and sentences in Civil matters on other laws, doctrines or texts different from the articles of the codes.” More importantly, “It is forbidden equally to the lawyers and the parties to quote or back their claims, pleas and reports in other texts than the prescriptions of the codes.”⁹⁵ The law was referring to “the principles of jurisprudence, the rules of the common law (*Derecho Común*), and natural equity.”⁹⁶ The Civil Code also included self-referential provisions to fill in the normative lacunae and to prevent judges from applying other sources like the legal doctrine, customs or jurisprudence: “judges cannot refrain from applying the laws, and can only judge according to them.”⁹⁷

The procedures were also restricted to the ones prescribed, but three important rules opened the jurisdictional spectrum recursively. First, it stated that all pending lawsuits at the time of enacting the new codes were to be adjudicated according to the laws in force when the contracts or deeds from which they originated took place. Second, it also ordered that “pre-existing laws should be applied in new lawsuits if the contracts or deeds from which they derived require the enforcement of such laws”. Third, the law expressly stipulated “merely ecclesiastical lawsuits will be handled and judged following Canon Law”.⁹⁸ These provisions and the traditional *nomos* make it hard to imagine how positivist legal reasoning could flourish overnight.

For example, the incorporation of the conclusive oath (*juramento decisorio*) in the Civil Procedure Code of 1852 is another evidence of interlegality. By establishing it as a full proof in trials, the republican legislator acknowledged the Catholic ethos of Peruvian society and the importance of religious beliefs for orienting social behavior, even of litigants. As Decock will agree, this is an instance of “collaborative legal pluralism” in which secular law

95 Law issued on December 29, 1849, article 5, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1849086.pdf>.

96 Law issued on December 29, 1849, article 8, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1849086.pdf>.

97 Article VIII of Preliminary Title of the Civil Code, 1852, quoted in RAMOS (2001) 277.

98 Law issued on December 29, 1849, articles 15, 16, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1849086.pdf>.

recognized the “the court of conscience” and “the sacramental jurisdiction of the interior or the soul (*forum conscientiae*)”.⁹⁹ Such was the authority granted to the *juramento decisorio* of the defendant that it ended the trial, and the ruling had the same value as if it had been substantiated based on other full proofs (e. g., public deeds or expert witness depositions).¹⁰⁰

The normative framework of the special military jurisdiction (*Fuero Militar*) is yet another relevant example of the Peruvian pluriverse. The Military Ordinances issued by Charles III in 1768 constituted its normative core.¹⁰¹ It is important to stress that this was a personal forum that encompassed the persons, goods, and relationships of militaries and militiamen enrolled in the armies of a very convulse era. As Annino reminds us, the 1768 Ordinances “granted full jurisdiction to officers, not limited to military discipline. An officer was also a judge in civil, criminal and patrimonial matters”. Property owned by military personnel and their families were exempted from ordinary jurisdiction. If a landlord or a peasant entered the royal army, the independence armies, or the warring factions of republican caudillos, they could invoke the military special jurisdiction to protect their large or small properties.¹⁰²

It took forty years after independence to formally abolish this powerful personal jurisdiction.¹⁰³ However, a caveat was extended to its operation: “The special Courts and Tribunals as well as their special Codes will remain in force until the law reforms them conveniently.”¹⁰⁴ Liberal jurists, like Silva Santisteban, accepted the survival of the military jurisdiction because complex societies demand functional differentiation based on the nature of things and not on personal privilege.¹⁰⁵ Since the first republican Military Code was promulgated in 1898, it is safe to say that the old Bourbon Ordinances, albeit amended partially, regulated military affairs over the 19th century. This, again, opens a new set of research questions on the issue of legal

99 DECOCK (2017) 104, 107.

100 CÓDIGO DE ENJUICIAMIENTOS EN MATERIA CIVIL (1852), articles 696–709.

101 CARLOS III (1815 [1768]).

102 ANNINO (2017) 49. CARLOS III (1768 [1815]), tratado VIII, título I, articles 1–10. See MORELLI (2007) 138–139.

103 CONSTITUCIÓN DEL PERÚ (2006 [1860]), article 6.

104 CONSTITUCIÓN DEL PERÚ (2006 [1860]), article 136. SILVA SANTISTEBAN (2015 [1856]) 304, 393–394; VILLARÁN (1998 [1915–1916]) 565.

105 SILVA SANTISTEBAN (2015 [1856]) 265.

pluralism, shopping forum, and the peasant and indigenous engagement with this jurisdiction.

Merchants also developed their own legal worlds. In 1853, Peru literally adopted, albeit with some modifications, the 1829 Spanish Commercial Code.¹⁰⁶ Until then, traders were under the jurisdiction of the Tribunal del Consulado de Lima (Merchant's Guild). The tribunal was composed of three wholesale traders elected by all the merchants of the city. It was in charge of applying its ordinances issued in 1627 and the Ordinances of Bilbao (1737). Lima's Guild and its provincial Deputy Guilds became 're-established' in 1829 "according to the Ordinances of its erection", as long as they did not contradict the new republican laws.¹⁰⁷ In terms of the interlegal quality of this special jurisdiction, it is interesting to observe that Lima's traders could appeal to a Merchant's Tribunal comprising one lawyer and two merchants. In the rest of the country, two judges of the provincial Superior Court and one merchant formed the appeals court. As a final step, all parties could appeal to the Supreme Court for annulment.¹⁰⁸ The 1853 Code kept this pyramidal system of specialized mixed courts in place for trading disputes, expressly stating that the colonial Ordinances of Bilbao were abrogated only in the parts that contradicted the new code.¹⁰⁹ The final republican assault against this special forum was launched in 1886 and 1887, suppressing both the Tribunal and its Deputy Guilds, and assigning the enforcement of the Commercial Code to the ordinary courts.¹¹⁰

Colonial ordinances were not the only source of the new code. Custom was recognized as a privileged normative source. For example, trade contracts were interpreted on the basis of the contract, the deeds of the parties, "the common usage and generally observed practice" of merchants, and the good

106 *CÓDIGO DE COMERCIO DE LA REPÚBLICA DEL PERÚ* (1853) includes a law issued by Congress on December 23, 1851 (article 1: "The Republic adopts the Spanish Commercial Code with the necessary changes required by the circumstances"). In turn, the 1829 Spanish code was a composite of the 1737 Bilbao Ordinances and the French Commercial Code of 1807. See CHANDUVÍ (2020) 137–138.

107 Law dated December 2, 1829, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1829048.pdf>; ORTIZ (1989) 54–56.

108 LAMA (1907) 5.

109 *CÓDIGO DE COMERCIO DE LA REPÚBLICA DEL PERÚ* (1853), articles 1234, 1269; see BASADRE (1956) 379.

110 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1887017.pdf>; <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1886061.pdf>. The 1853 code would be replaced in

judgement of persons with expertise in a given trade branch (article 191). In a similar way, the seller was required to keep the merchandise in good condition as per the contract, “trade use”, or legal obligation (article 310.2). The commission agent could delegate some of his duties by following “general trading customs” (article 79, also 70) and had to adapt the terms of his credit sales to the “uses adopted in the plaza where the sale takes place” (articles 97, 100). Bills of exchange were cashed at an exchange rate adjusted to the “use and custom of the plaza” (article 449). Customary law was also applicable for sea trade. Thus, the officer in charge of a shipment could only practice shoddy trade as authorized by the owner of the cargo or “the customs of the port where the ship was dispatched” (article 727), and the food supply for the crew had to follow the “use and custom of navigation” (article 1016.1).

What is important to observe in both instances – special judicial circuit and normative contents – is the leading role played by merchants in the regulation of their affairs. Merchants, appointed as judges, enforced centuries-old regulations and local customs to adjudicate cases. And in their daily business they applied their special and customary laws. Inclusion in this special jurisdiction was based on the habitual economic activity of its members, which could also be performed by women, foreigners and those under-aged.¹¹¹ Ethnic adscription or national origin were not grounds for inclusion or exclusion. It follows that indigenous and mestizo merchants, for example, also came under the aegis of the special legislation, the Tribunal del Consulado, and, later, the particular forum established by the Commercial Code of 1853. Future research would still need to uncover how, and in what conditions, they participated in this legal and economic field, but on the question of jurisdictional and normative pluralism, the Merchant’s Guild is a case in point.

Likewise, miners and mining had a history of legal autonomy. Until the enactment of the 1901 Mining Code, this activity was regulated by the colonial ordinances issued in 1787 for the Peruvian Viceroyalty.¹¹² A Royal Mining Tribunal in Lima was the jurisdictional and administrative authority

1902 with a body of law largely based on the 1885 Spanish code, see CHANDUVÍ (2020) 148.

111 CÓDIGO DE COMERCIO DE LA REPÚBLICA DEL PERÚ (1853), articles 1, 3, 7, 8, 9, 11.

112 At the same time, these Ordinances were an adapted version of the *Ordenanzas de Minería de la Nueva España* issued in 1783: BASADRE (1984) 264–265. According to one author, they “influenced the United States mining law”: in BASADRE (1956) 391, fn. 15.

over several mining provincial councils (*Diputaciones de Minería*). These bodies, formed by professional miners, were in charge of enforcing their special law. In 1829, the republic ‘reestablished’ this special forum according to the colonial ordinances.¹¹³ Its jurisdictional powers were confirmed in 1835 and intermediate appellant’s courts (*Juzgados de Alzadas*) were introduced as a way of strengthening the system.¹¹⁴ But the Tribunal was already suspended in the following year and its jurisdictional role ascribed to Provincial Councils and the ordinary Superior Courts.¹¹⁵ In 1875, the Tribunal was suppressed and its administrative functions transferred to a Bureau of the Ministry of Finance. However, Provincial Councils were kept in charge of adjudicating mining rights, following their special ordinances.¹¹⁶ Finally, in 1877, a law ordered that ordinary judges could replace miners in case there was no council in the province, in abrogation of the ordinances and all laws that were opposed to it.¹¹⁷ This means that the longstanding colonial regulations were in force, either as positive norms or as customary law. Moreover, the old institutional architecture was resilient. Thus, in 1907, De la Lama described the existence of first instance mining courts, formed by two deputies, and of appellate tribunals composed of two superior judges and one miner.¹¹⁸ Again, since inclusion or exclusion in this special forum was not ethnically based, it remains to be seen how indigenous and mestizo miners, not to mention women (e. g., widows) or foreigners, operated in this legal field.

Finally, the Water Law was also pluralistic par excellence in spatial, temporal, normative, and institutional dimensions. By definition, Water Law is applied locally, and given the nature of the resource, it is usually shared by different social groups, be that indigenous, mestizo or white, leading to a dynamic of cooperation and conflict between, for example, haciendas, mines, peasants, and towns. Each force field creates a different waterscape with particular normative and institutional configurations.

The standard temporal narrative is that two colonial ordinances were in force until the promulgation of the 1902 Water Law Code.¹¹⁹ Originally

113 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1829049.pdf>; ORTIZ (1989) 56.

114 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1835056.pdf>.

115 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1836103.pdf>.

116 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1875054.pdf>.

117 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1877027.pdf>, articles 20, 27.

118 LAMA (1907) 10.

119 GUEVARA GIL (2013) 56–57.

devised for the capital's hinterland and published in 1793 by Judge Ambrosio Cerdán de Landa y Pontero, the *Tratado de las aguas de los valles de Lima* was based on the ordinances of Viceroy Francisco de Toledo (1577) and Judge Juan de Canseco (1617) as well as the court rulings and the evolving local water management customs. During the course of the 19th century "it was enforced in almost all the country".¹²⁰ The second prominent corpus of water regulations was compiled in 1700 by the deacon of the Cathedral of Trujillo, Antonio de Saavedra y Leyva, for the valley of Trujillo in the North coast.¹²¹

The nature of the institutional and normative history of this forum is convoluted.¹²² In 1836, Special Water Tribunals (*Juzgados Privativos de Aguas*) were "reestablished in this capital [Lima] and in all the settlements where they served before independence". In the adjudication of cases, the judge was joined by "two farmers", who were landowners in important valleys, and this decision stressed self-regulation.¹²³ Following the mandate of the 1839 Constitution, a *Juzgado Privativo de Aguas* was instituted in Cajamarca in 1848.¹²⁴ And in 1868 a law recreated the Special Water Tribunal of Lima because "the ordinance in force [Cerdán's, 1793]" was not being "adequately observed".¹²⁵

To complicate the matter, there was interference from other judicial circuits in their jurisdictional autonomy in at least two instances. In 1855, President Ramón Castilla decreed the "merging of the special water jurisdiction to the lower court of the ordinary jurisdiction, both for the distribution of water turns and for ruling on disputes".¹²⁶ Fifteen years later,

120 BASADRE (1984) 265; MARILUZ URQUIJO (1951) 3–5. It was so important as official law that it was modified as late as in 1895; <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1895107.pdf>.

121 BASADRE (1956) 391–392; BASADRE (1984) 265–266.

122 There is no systematic account of the history of Water Law in Peru.

123 Presidential decree, May 26, 1836, article 1, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1836046.pdf>. Two years later, the jurisdictional and management functions were divided between a judge who adjudicated by himself and the special commissioners for water management <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1838078.pdf>, articles 1, 2.

124 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1848034.pdf>.

125 Law promulgated on November 11, 1868, first consideration, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1868035.pdf>. One year before, a Presidential Decree ordered the same recreation, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1867008.pdf>.

126 Decreed issued on June 4, 1855, article 1. It also recognized the validity of the "Ordinances and special laws for water distribution" and ordered regional prefects to convene

Lima's Special Water Tribunal was ordered under a new law to "review the appeals of the criminal and civil lawsuits filed against the rulings of the Justices of the Peace" due to the overload of ordinary courts.¹²⁷

Despite this winding institutional life, the water forum was normatively strengthened. In 1838, a Presidential Decree sanctioned that "in water affairs nobody benefits from forum exemption and water judges cannot be challenged, unless a legal and proven cause". It also determined that coastal valleys should use water "in accordance with the turns and allocations prescribed in the Ordinance of D. Ambrosio Cerdan, Judge of the late *Audiencia*, which is declared in force and integral part of this decree".¹²⁸ According to Jorge Basadre, in 1841 President Agustín Gamarra (again) ratified Cerdan's Ordinances.¹²⁹ Similarly, in mid-century, the 1700 Ordinances of Deacon Saavedra were stretched to regulate water management in two more important valleys of the northern coast.¹³⁰

Water management and conflict resolution had another source of plurality, namely the laws and regulations on the role of municipalities in local affairs. For example, the 1834 Organic Law on Municipalities granted the boards of towns (*villas*) and cities the authority to manage water resources "according to existing ordinances". The Organic Law issued in 1853 also bestowed upon them the power to oversee water distribution, establish rules to prevent floods, and "appoint one of its members to act as a *Juez de Aguas*, without charging fees". When several municipalities shared a water source, they were required to appoint a common special water judge and could "enact water ordinances". Three years later, another law further bolstered this scheme and stressed the division of labor between water judges and water managers. An 1861 law and an 1866 ordinance reiterated the role

"popular meetings" to prepare new ordinances (article 5), <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1855054.pdf>.

127 Law promulgated October 29, 1870, single article, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1870030.pdf>. In 1867, a Presidential Decree assigned the same jurisdictional role to Water judges, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1867008.pdf>, articles 1, 2.

128 <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1838087.pdf>, chapter I, article 6; chapter II, article 1.

129 BASADRE (1956), 392, refers to a decree issued August 4, 1841. This is not included in <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX>.

130 Presidential decree issued on April 12, 1856, <http://www.leyes.congreso.gob.pe/Documentos/LeyesXIX/1856105.pdf>.

municipalities should play in water governance, ordering these bodies “to respect the customs of people living in small towns or in the countryside” unless the common good or morality warranted direct intervention in those social fields. Lastly, the laws of 1873 and 1892 ratified that municipalities were in charge of urban and rural water management and retained the division of labor between water managers and judges or tribunals.¹³¹ Even a modest share of historical imagination would lead to the conclusion that in the vast Peruvian territory, hundreds if not thousands of waterscapes were formed, each with its own normative and institutional peculiarities. Most likely, these shared a common bedrock that originated in colonial legislation and customary law, which represented prominent sources of legal pluralism.

4 Final remarks

Ralf Seinecke’s thought-provoking article opens up new avenues of research in legal history – on the central role of legal pluralism, not only in German jurisprudence but also in the legal history of Latin America, particularly of Peru.

Due to the lack of comparable sources, I have written a decentered comment. 19th-century Peruvian legal scholarship did not address the issue of legal pluralism. This is the reason why I have used legislative sources to find out if legal pluralism claimed the same place of importance in the Peruvian legal landscape as it held in German jurisprudence during the same period as depicted in Seinecke’s account.

Exploring some of the major normative fields and special jurisdictions in force, I conclude that legal pluralism was paramount in the pluriverse Peruvians inhabited. Even codification, supposedly the epitome of legal centralization and standardization of liberal law regimes, was a vehicle for strengthening pluralism. The republican codes were not drafted as new bodies of systematic modern law. They included or recognized important bundles of old colonial regulations. At the same time, republican courts appealed to *Derecho Antiguo* to ground their rulings, while different officially sanctioned jurisdictions kept their institutional autonomy and special normativities in place. In this complex normative and institutional world, temporal legal pluralism crisscrossed the life and deeds of sociolegal agents.

131 GUEVARA GIL (2013) 57–59, includes detailed references of the laws and ordinances mentioned.

Future research should use Seinecke's insights for questioning the standard narrative on the evolution of Peruvian legal history in the 19th century. The idea that old colonial laws were replaced by a *Derecho Intermedio*, which was, in turn, substituted by full-blown codification as an expression of modern liberal ideology and law, does not hold. An alternative reading of the normative, institutional and ideological multiverse of that period should attempt a new periodization, taking into account the undeniable significance of legal pluralism – normative, institutional, and temporal.

It is more rewarding to portray this period in terms of a *tertium quid*. 19th-century Peruvian law was not an either-or between the *Ancien Régime* and liberalism. The organic and status-based colonial society was not progressively and completely superseded by a liberal, individualistic and modern order.¹³² Legal pluralism is, precisely, the code word for understanding the temporal, jurisdictional, and normative entanglements that characterized legal performances and social life in that century.

Finally, the fact that ethnic and cultural differences were not the foundations of these legal spheres does not mean indigenous people or the peasantry lived in an isolated and separate legal universe. They were not excluded, by definition, from participating in the military, mining, merchant or Water Law jurisdictions, among others. Thus, it is wrong to assume that only the constitutional recognition of their rights (1920) granted them legal agency. It remains a research question as to how they behaved as legal agents before. Understanding their deeds in that plural world will help refashion our image of 19th-century Peruvian law. In addition, it will help overcome the current disciplinary short circuit between legal history and legal anthropology, opening new avenues for a much-needed interdisciplinary dialogue.

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132 BASTIAS (2018) 328; MORELLI (2007) 133, 147.

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Pluralistic Legal Thought in Chile: A Critical Overview

This essay is an invitation to think critically about the law.¹ It reconstructs the development of legal pluralism within the Chilean context and history of the interaction between formal discourse, on the one hand, and alternative narratives and worldviews about law on the other. In so doing, my main objective is to show in what ways and settings even non-state entities or social groups can be regarded as *de facto* lawmakers.

Four basic premises are useful for exploring the notion of pluralistic legal thought.

Firstly, pluralistic legal thinking – used here synonymously with legal pluralism – refers neither to *ley*, *legge*, *loi*, nor to the coexistence of substantive or written law; instead, it deals with *derecho*, *diritto*, *droit* and relates to questions of group identity and culture, legal autonomy and rights. These questions, as Seinecke points out, are central to debates on diversity.² By viewing legal systems from a non-state-centric legal perspective, it becomes evident that both the *state* and its ‘*formal rule*’ are subject to the *law*. In this sense, thus, law is part of a much larger universe, one dominated by an intersubjective dimension, which is characterized by its “social dimension”.³

Secondly, it is necessary to highlight that in presenting pluralistic legal thinking, I am concerned more with the phenomenon of coequality and coexistence of a society, its citizens and institutions, in effect with how they actually *live together*, or choose to do so. In other words, legal systems as such are not at the centre of this study. To that extent, this study reflects on how different modes of conducting social relationship or how different conceptual understandings of ‘*histories*’ coexist within a single legal system.⁴

1 For a more detailed account on this topic, see WOLKMER (2003a).

2 See the contribution by Seinecke in this volume.

3 GROSSI (2012) 12.

4 For more on this account, see HALLIDAY (2013).

Thirdly, the tradition of pluralistic legal thinking in Chile emanates from the colonial era of *legal particularism* in Latin America, and thus derives from colonial law. For that reason, it is difficult to delineate the *histories* that coexist in Chile without taking into account the context in which the history of pluralism spread across Latin America. If national histories are to be understood within the transnational frame, this article raises questions about the “different spatial configurations” of such legal histories that are forced into imperial structures by the colonizing power.⁵

Finally, as understandings of ‘*diversity*’ are highly contingent on time,⁶ the starting point of this study is the conviction that the concept of pluralism is subjective, in that it depends on the type of history legal scholars choose to tell. As such, legal pluralism is subject to the critical perspective (and personal sensitivity) of each scholar. Thus, far from being a neutral term, legal pluralism bears a strong connection to the scholars’ individual or personal moral values and ideas of the law.

This essay is divided into two sections.

Part 1 focuses on the analysis of the counter-model to the concept of state legislative monopoly in Chile mainly through the study of the evolution of custom as a source of law. This section argues that the hegemony of legal formalism in Chile posed a formidable obstacle to the implementation of other *histories* or *narratives* exceeding the realm of the written law.

Part 2 studies the scientific and non-state forces that changed, or at the very least challenged, the hegemonic concept of law in the Chilean legal culture. This section presents some cases drawn from the Chilean jurisprudence that show how the idea of law has been changing over time. Moreover, this part also illustrates the relevance of labour movements, of economic-interest groups and of the indigenous people, especially in legislative change. In this regard, the notion of pluralistic legal thinking interrogates the set of truths that have dominated the concept of law in Chile since its independence.

Needless to say, this study does not represent an exhaustive analysis of legal diversity. Rather, it highlights aspects of comparative private law and is aimed to stimulate critical reasoning in areas where little theoretical attention has thus far been paid to legal pluralism.

5 DUVE (2017).

6 See the introduction by Collin and Casagrande in this volume.

1 From pluralism to monism

1.1 Customary law in colonial era

Legal pluralism was an alien concept to the Chilean jurists at least until the 1990s. Only recently, as an echo of foreign theories and significant legal changes in the region, there has been a growing interest in the theoretical and operative implications of this subject.⁷ However, while the academic research on legal pluralism has largely been ignored, Chilean jurists and legal historians have implicitly analysed the countermodel concept of a state legislative monopoly by looking at the foundations of the colonial and republican law. In this regard, *custom* has been used to refer to any form of non-written or autochthonous law in the indigenous or Creole rule, without regard for provenance, and thus, for instance, irrespective of whether the origins of a custom lie in America or in Spain.⁸

It is evident that in any context the history of the evolution of custom is to some extent connected to the legal system's ability to navigate pluralism.⁹ In this sense, it is worth remembering that the issue of customary law in the last two hundred years of the republican Chile has had a rather narrow application when compared to what was established under the Spanish rule.

In fact, following the European trend from the Middle Ages to the Modern Age, custom in colonial Chile was a formal source of law. It is well known that the *Siete Partidas* (a statutory code which includes Roman law in the version provided by the glossators of the 12th century) recognised custom as an enforceable non-written law.¹⁰ As a source of Castilian law, this code played a subsidiary role during the colonial era. Furthermore, from the time of *Leyes Nuevas* (1542–1543), indigenous customs have received special treatment within the formal legislation and coexisted within a pluralistic

7 In fact, between 1978 and 2008, fifteen constitutional texts recognizing indigenous peoples' rights, new forms of democratic participation, and the pluralistic character of society were enacted. This trend goes hand in hand with the influence of Boaventura de Sousa Santos and Gunther Teubner's essays on the debate about legal pluralism in Latin America. See GARCÍA VILLEGAS (2012) and OCAMPO (2018).

8 See MÍGUEZ NÚÑEZ (2016).

9 See BEDERMAN (2010).

10 "Se llama costumbre al derecho o fuero no escrito, el cual han usado los hombres largo tiempo ayudándose de él en las cosas y en las razones por las que lo usaron." (Partidas 1,2,4).

legal framework.¹¹ This structure was maintained by the *Recopilación de Leyes de las Indias* (1680), which recognised custom as a source of law by allowing a wide range of indigenous applications.¹² Hence, an essential aspect of colonial legislation was the adaptation of the Castilian law and institutions to the existing customs in the New World. Besides, multiple interrelated social and institutional orders interacted: the Law of the Indies (either created in the peninsula or in the Americas), the Laws of Castile and the indigenous customs.¹³ This lack of a centralised lawmaking process guided and controlled by Spain shows that the colonial framework was pluralistic with respect to the sources of law, as it recognised different notions of the law. In other words, the colonial law was fully immersed in the theoretical framework of the ‘*alternative law*’. It entailed interactions between the official (centralised) and the alternative law in a structure that, following Seinecke’s assumptions, can be defined as “legal-interlegality”¹⁴ or “pluralism of colonial origin”.¹⁵ For all practical purposes, from an ideological perspective, the colonial state sought to ensure unity based on differences by allowing interaction between different social orders.

1.2 The republican era: Civil code and legal classicism

The affinity towards a pluralist model is interrupted in the 19th century with the emancipation of America. It is well known that the republican law is nothing other than legal unity, or the concentration of lawmaking processes in the centralised state. Accordingly, legal pluralism or ‘*normativism*’ that developed during the colonial era bears comparison to the idea of rationalism, which implicates the notion of ‘*monism*’.

From the perspective of private law, three observations on the introduction of the civil code (1855) should be linked to this phenomenon.

Firstly, custom was almost entirely excluded from the code as a source of law. Chilean civil code defined what should be understood as *ley* (art. 1), but

11 Notably, the *Tasa de Gamboa* (1580) contains a first example of recognition of indigenous custom in the Chilean territory.

12 See, for instance, L. 4, tít. I, lib. II.

13 On the reciprocal influence of pre-Hispanic and Castilian law during colonial times, see GONZÁLEZ DE SAN SEGUNDO (1995); MARILUZ URQUIJO (1973).

14 See the contribution by Seinecke in this volume.

15 See SANTOS (2007) 97. See also SEINECKE (2018).

omitted any concept of custom, thus erasing the pluralism of the Castilian legal tradition inherent in colonial law, which recognized custom as a source of law. Besides, art. 2 (following the formula enacted by the Austrian civil code) predicated the validity of custom on its recognition in written law.¹⁶

Secondly, on the issue of legal interpretation, the code established that when the meaning of the law is clear, the judge shall not ignore its literal tenor (art. 19) and that the words of the law shall be understood in their natural and obvious sense (art. 20). Even if the text of the law is obscure or defective, the judge must not disregard the “general spirit of the law” and the “natural equity” by resorting to external elements such as custom (art. 24). Evidently, these rules limit the role of the judge to a “mere voice” of the written law. The judge, as Andrés Bello said, “should be the slave of the law”;¹⁷ and as a result, to put it as Lira Urquieta brilliantly did, “the law and the supreme government replaced the King”.¹⁸

Thus, in a context dominated by the so-called cult of the written law, custom and the tradition of colonial pluralism were considered only a simple relic of a bygone era of legal evolution; legal pluralism was thereby reduced to a simple custom in a primitive society and the role of non-written sources of law was barely subsidiary.¹⁹

The last notable consideration is that the figure of the *Indio* did not appear on any page of the civil code. As affirmed by Lira Urquieta, the code “shamefully hid the existence of indigenous people in the region of the ancient Araucanía”.²⁰ This omission not only broke with the pluralist tradition of the colonial times but also with the history of the Iberian Peninsula where the Romans had lived along with Celtiberians, the Hispano-Romans with the Goths, and the Arabs with the Christians.²¹ Significantly then, the civil code neglected not only the presence of the *Indios* and their customs but, thus, also their transformation into model modern citizens.

Clearly, the legal-centric model adopted by the civil code must be read in the context of the consolidation of sovereignty and independence. For

16 On the origins of these rules, see FIGUEROA QUINTEROS (1982).

17 See TAU ANZOÁTEGUI (1982) 109–110.

18 LIRA URQUIETA (1956) 25.

19 For a general review on this point, see BARAONA GONZÁLEZ (2010) 434–435.

20 LIRA URQUIETA (1956) 28.

21 BASADRE (1985) 282.

republican authorities, private law represented the most effective legal tool to achieve Chilean independence and to ensure political control; private law reform would then lead to the desired internal order within the new state. Therefore, the civil code was introduced both to strengthen the national unity and to replace the legal pluralism of the colonial era with a rigorous monism.²² According to art. 14 of the code, written law “is mandatory for all inhabitants of the Republic, including foreigners”, and after the code’s entry into force (January 1, 1857), all pre-existing laws on matters treated in it shall be repealed (last article c. code). Moreover, it is easy to understand that while the unitary state was still consolidating, there was no room for accommodating pluralism through “state courts” (as it remarkably happened in the case of the New German Reich²³). In this way, social and regional diversity were also destined to converge in the monist structure imposed by the unique judiciary power.

The impact that this concept of legal order would have upon the idea of legal pluralism in the 20th century requires a brief explanation. Two broad issues can be identified that typically developed in Latin America.

First, a considerable part of the 20th century was characterised by both the late theoretical transplantation of a technique associated with the code (the exegesis) and the reception of the methods of the Romanists and civil law scholars linked to German conceptualism. The combination of both factors increased the sway of the general and abstract current of legal thinking that would go on to dominate the study of the law in Latin America as “legal classicism”.²⁴ This theoretical framework was not hospitable to theoretical analyses based on sociological considerations, for which reason empirical observations of local reality could not yet be fully accommodated. A paradigmatic example of this ideological model can be read in the most

22 MÍGUEZ NÚÑEZ (2016) 306.

23 The reference is to § 15 of the *Gerichtsverfassungsgesetz* (Courts Constitution Act of 1877). For more on this, see the contribution by Seinecke in this volume.

24 LÓPEZ MEDINA (2004) 130. See also BARAONA GONZÁLEZ (2010) 433. According to BARROS (1988) 109, “ocurre que el positivismo legal en materia civil en Chile es una mezcla de esas dos tradiciones. La primera hace al Código algo así como una expresión de una racionalidad perfecta, simétrica, que es tan frecuente entre algunos profesores de Derecho Civil. Pero, por otra parte, goza de la legitimidad republicana dada por el hecho de haber sido una ley de la República.” For more on positivism and formalism in the Latin American legal education, see COURTIS (2003).

outstanding commentary of the Chilean civil code. In his *Explicaciones de Derecho civil chileno y comparado*, Luis Claro Solar (1857–1945) declared that “in a country like Chile, where the law is the result of the constitutional powers, which exercise the sovereignty entrusted to them by the nation, the law cannot be at the same time the result of the work of the community of citizens”. Therefore, he added, “written law is a source of law; custom is not”.²⁵

On the other hand, the dogmatic formalism of the Vienna School, headed by Hans Kelsen, outlined the culmination of centralisation of the legal order in the state in what can be called ‘cultural legal monism’. During the 20th century, no other legal theorist had as much influence in Latin America as Kelsen.²⁶ Notably, the Latin American reception of his *Pure Theory of Law* has been fundamental to the belief that the state is the only institution through which a nation might create law. This belief establishes the primacy of scientific rationality that postulates the process of creation and application of law without any ideological contamination. Kelsen’s influence in Chile is widely known, and its positivism, as Baraona González has pointed out, found a good ally in Chile’s legal environment, which was then partly influenced by the legalism of the school of exegesis.²⁷

As a result, from the birth of the republic to the first decades of the 20th century, the Chilean legal system tended to privilege *apolitical* judges and legal operators. They represented voices of a law which has been understood as a manifestation of the centralised executive power, while the most outstanding legal doctrine has limited itself to applying, in an acritical way, the – transplanted – principles (whether of European or North-American origin) on which the national codes founded the unitary state.²⁸

25 CLARO SOLAR (1979 [1898]) 42–43.

26 For a first – critical – overview of such influence, see ESQUIROL (2009) 705 ff.

27 BARAONA GONZÁLEZ (2010) 436. The establishment of the Constitutional Court at the beginning of the 1970s, and the pyramidal conception of the legal system are clear examples of that influence. For more on this, see MONTT OYARZÚN (2005) 271–273.

28 For an indispensable analysis of this phenomenon, see HILBINK (2014). See also BRAVO LIRA (1998) 92 ff.; SQUELLA NARDUCCI (2001) 552–555.

2 From monism to pluralism

2.1 Legal pluralism in Chilean jurisprudence

Coming up with a history of legal pluralism in Chilean jurisprudence is arduous owing to the structural complexity described above. From the dawn of Chilean independence to much of the 20th century, what prevailed in the minds of most legal operators was a greater concern with the consolidation of the nation state (and the proper functioning of its institutions), rather than with any criticism about a state-centric idea of law. As noted by Edmundo Fuenzalida, Chile's early and exceptional institutional stability gave its legal system a degree of centralism uncommon in Latin America, and its legal operators developed a significant commitment to maintaining that stability. These facts explain the absence of a different ideological path to the Chilean nation-building.²⁹ Civilisation and progress, the ethos of a promising nation, demand uniformity of law and the integration of indigenous groups. In order to achieve that, law and jurisprudence had to meet the needs of a unitary state. As a result, the criticism of Chilean legal operators of such a stable rule of law could only be quite *tame*.

Accordingly, the discussion concerning legal pluralism in Chilean jurisprudence cannot be compared with that of the great dogmatic debates that arose in European countries during the 19th and 20th centuries.³⁰ In fact, for much of the 20th century, legal pluralism in Chilean academia could only be understood as a limited attempt to remove one or more of the hypotheses that have characterised the domestic legal culture, that is, the excess of rationalism and the exegetical method.

Identifying such efforts is a subjective act since it depends on the personal sensitivities and on the theoretical perspective from which legal pluralism is observed. In my opinion, legal jurisprudence has challenged the conventional view of the law by introducing four theoretical perspectives: conceptualism (or scientific positivism), legal evolutionism, the reform of legal education, and Marxism.

29 On Fuenzalida's analysis, see SQUELLA NARDUCCI (2001) 555.

30 See, for instance, the developments of legal pluralism in German legal thought analyzed by Seinecke in this volume.

2.1.1 Conceptualism in civil law scholarship

As in other legal systems, once the foundations of the new political order were laid down, Chilean civil law scholars devoted themselves to the *elementary exposition* of the civil code (i. e., José Clemente Fabres, *Instituciones de Derecho Civil Chileno*, 1863; José Victorino Lastarria, *Instituta del derecho civil chileno*, 1863). This strand of legal literature was followed by a *commentary* (or explanation) of the code that does not possess the characteristic of an autonomous *system* yet (i. e., Jacinto Chacón, *Exposición razonada y estudio comparativo del Código Civil Chileno*, 1868; Robustiano Vera, *Código Civil de la República de Chile comentado y explicado*, 1892–1897). In that period, scholars offered an analysis of the civil code in what was regarded as a “transparent way”, which meant it was aimed to be safeguarded against personal biases and a subjective interpretation of the law.³¹ Subsequently, in a phase that marked the birth of a critical review of the code and the “fetishism of the written law”,³² civil law scholars took to articulating their methods of Interpretive methodology by means of *treatises*.³³ The most representative example of this kind of literature is Luis Claro Solar’s *Explicaciones de Derecho civil chileno y comparado* (1898–1945). In a departure from the exegetical method, Claro Solar’s analysis went beyond the study of the code and its structure. Instead, for the first time, Claro Solar used comparative analysis to render an explanation of the civil code by making extensive use of colonial sources of law and legal materials from European countries. From then on, a *scientific approach* based on concepts and general principles has been used to teach law as a logical system and to criticise the rules that were inconsistent with the *system*. Thus, it follows that the dogmatic structure of the civil law had to be articulated in *general theories*.

It is beyond the scope of this study to explain the roots and consequences of these new methodological approaches for the Chilean legal culture (which could be found in the introduction of German conceptualist jurisprudence in Latin America³⁴). Instead, I would note that Claro Solar’s treaty

31 LÓPEZ MEDINA (2004) 160.

32 Expression coined in 1936 by Eduardo Zuleta Ángel, quoted by LÓPEZ MEDINA (2004) 290 ff.

33 See, generally, GUZMÁN BRITO (1992).

34 See LÓPEZ MEDINA (2004) 162–165.

represents not only the first time the legislator's role as the sole voice of the *system* is questioned but also the first time law is claimed to embody diverse *narratives* or *worldviews*.

2.1.2 Positivism and legal evolutionism

In a second effort to counter the *fetishism of the written law*, philosophical positivism was introduced into legal discourse. The assumptions underlying positivism were basically used to propose an analysis of society's laws through comparative histories and in dialogue with other branches of knowledge.³⁵ The effort consisted in establishing fluid interaction between legal science and the notion of law as a socio-juridical phenomenon. Although this method did not reach the same level of intensity in Chile as in other Latin American countries (with Argentina as a notable example³⁶), it is necessary to point out that positivism had been introduced by Valentín Letelier (1852–1919), a prominent intellectual, considered the most outstanding representative among the heterodox group of positivist thinkers in Chile.

Letelier introduced the study of sociology through a systematic presentation of historical theory.³⁷ This approach was further developed in his *Génesis del derecho*, which provided, for the first time, a scientific synthesis of the social origins of the law.³⁸ Letelier's attempts to interpret the origins of the main institutions of legal systems (such as family, property, inheritance) brought the legal discourse closer to social sciences. In this regard, the law must be understood as an '*ecology of knowledge*' derived from history and local ethnographic sources. In conclusion, Letelier's work can be said to mark the introduction of the multidisciplinary language into law. Hereafter, the historical and ethnographical method became an apt instrument to overcome the dogmatic rationalism of the 19th century.

35 See, notably, ÁLVAREZ (1900). On the implications of these ideas for the Chilean legal academia and society, see BASTIAS SAAVEDRA (2015).

36 See TAU ANZOÁTEGUI (2007) 19 ff. The same phenomenon can be observed in the Peruvian legal culture of that time. See MÍGUEZ NÚÑEZ (2012) 279 ff.

37 For more on Letelier's positivism see LIPP (1975) 53 ff.; JAKSIĆ (1989) 41 ff.

38 LETELIER (1919) 6.

2.1.3 *The 1960s: an attempt to reform legal education*

A third attempt to introduce alternative narratives on Chilean law concerns the *method* of legal education. At the end of the 1960s, structural changes were introduced in Chile owing to international pressure. In this regard, for the first time, Chile's legal academia was confronted with questions about *how* the law should have been taught. Funded by the Ford Foundation and based on ideological foundations of the Alliance for Progress, the "Chile Law Program" showcased the law and development movement to modernise Chilean legal education and legal research.³⁹ This initiative, as Merryman states, "was an Action program in support of efforts by Chilean law faculties to transform ('modernize') Chilean legal education and legal research in order to build a corps of legal professionals and a tradition of legal scholarship that would help provide the legal infrastructure thought by Chileans to be necessary for the nation to achieve its social and economic ambitions".⁴⁰

Although this attempt may have spawned diverse political opinions, it is worth underlining that the program proposed an idea of law (albeit a *tame* one) as "social practice" (as opposed to a normative order) and an answer to the question of the role of law as instrument of social change.⁴¹ Thus, legal education and its didactics were subject to a collective and systematic review, which lead to the introduction of several aspects, such as the American case law and the Socratic method, as well as the incorporation of other branches of the social sciences in legal training. Accordingly, Chilean scholars established the *Instituto de Docencia y Investigaciones Jurídicas* in Santiago (1969–1975) to ensure that some of the initiatives in legal education would be carried out, and in July 1970, the first issue of the Bulletin of the Institute was published. The 29 issues that appeared between July of 1970 and March of 1975 addressed a large number of topics relating to the didactics and the theory of law and offered a serious analysis of virtually all subjects of law education.⁴²

The Chilean government, under both Salvador Allende and Augusto Pinochet, grew increasingly suspicious of U.S. involvement in law schools,

39 COOPER (2008) 538.

40 MERRYMAN (2000) 481.

41 SQUELLA NARDUCCI (2001) 556.

42 BENFELD ESCOBAR (2016) 151.

and government pressures forced the program to close. Several scholars went on to incorporate what they had learned in their own courses, but the political climate did not allow for much progressive change in legal education. As a consequence of political and military events, the Chilean government once again forced most of its legal operators to adopt an even more cautious attitude than in the 19th century. This kind of attitude began to be challenged towards the end of the military government, when the *Corporación de Promoción Universitaria* again called into question the most outstanding features of the Chilean legal culture.⁴³

Despite its failure, it is important to underline that this first attempt to reform legal education introduced a new ‘narrative’ with political aims that were obvious, namely, to clear the way towards establishing an economic cooperation between the U.S. and Chile. Accordingly, since *ideology* demanded an alternative concept of law, the *ideological* dimension of legal pluralism came to fruition.

2.1.4 *Marxism in legal academia*

The same conclusion can be drawn through a succinct analysis of the Marxist legal-philosophy, which the outstanding work of Eduardo Novoa Monreal (1916–2006) undertakes. Novoa Monreal’s study is characterised by its critical approach to specific obsolete and inefficient legal mechanisms that produced “principles, concepts, and values of capitalism and conservative liberal-individualist ideology”. In his *El derecho como obstáculo para el cambio social*,⁴⁴ he explains the delay in introducing the Latin American law in the face of changing social conditions as being due to the “petrification” of the law in the individualistic and liberal principles of 19th-century legislation (written law in “codes”). As an alternative to this framework, the author underlines the relevance of the modern legislation that has emerged from Latin American social movements (since the Mexican Revolution of 1910). The main criticism that Novoa Monreal raised was that this legislative dimension had been obstructed by the bourgeois law that inhibits any

43 On the work developed by the *Corporación de Promoción Universitaria*, see SQUELLA NARDUCCI (ed.) (1988) and (1994).

44 NOVOA MONREAL (1975).

change in the social structure. Thus, given that suggestions to adapt the legal system to the Latin American needs and idiosyncrasies came from the left, *ideology* – again – had permeated the debate for a much needed *alternative law*.

2.2 Non-state groups and legal change

Three social forces can be regarded as leading lawmakers outside of the state in republican Chile: labour movements, indigenous people, and economic interest groups.

My concern with these three forces is related to the establishment of three legislative milestones in Chile: the enactment of social legislation, the privatisation of public enterprises, assets and services, and the formal introduction of legal pluralism (or '*legal interlegality*').

It is outside the scope of this study to analyse in detail the political history of each of those social-economic developments. It has, however, engendered a different understanding of what constitutes legal pluralism and its functions in the Chilean context.

The concern with *La cuestión social* (1880–1920), that intensified in the early decades of the 20th century, represents the first area of study on the reconstruction of social and legal change in Chile (1880–1920). In the light of this, when it comes to legal pluralism, the main challenge is understanding how labour movement and intellectuals got together to create an alternative legal discourse to that of the ruling class.⁴⁵ The discussion about a labour legislation that would leave behind the colonial regime and lead to the consolidation of a liberal and capitalist republic, in turn, brought forth new philosophical, political, and ideological discussions on legal pluralism.⁴⁶

A second line of thought on non-state lawmaking is related to the effect of establishing a liberal economy that was based on the neoclassical paradigm during the Chilean military dictatorship.⁴⁷ This phenomenon is linked to the influence of a group of economists (known as Chicago Boys) and the

45 For an indispensable analysis in this respect, see GREZ TOSO (1995); CRUZAT/TIRONI (1987).

46 See, notably, BASTIAS SAAVEDRA (2015) 42 ff.

47 See GÁRATE CHATEAU (2012).

gremialista sector (led by Jaime Guzmán Errázuriz), who took control of the economy in the second half of the 1970s. As now confirmed, the process of implementing the economic reforms introduced between 1975 and 1989 led to the privatisation of companies and public services. The neoliberal economic model, influenced by the so-called Washington consensus, endured even after the return to democracy (1990–2003). The neoliberal economy required the guarantee of the rule of law as well as a transparent, efficient and functioning judicial power.⁴⁸ Significantly, clear examples of that were the criminal procedure reform, intensified human rights protection, increase in access to justice and implementation of dispute resolution mechanisms. These facts demonstrate how legal reforms have been used to further political (and economic) gains in recent Chilean history.⁴⁹

Finally, I would like to offer a few points for reflection on the most obvious issue related to Chilean legal pluralism, namely the recognition of indigenous rights.

Four factors must be taken into account to gain a better understanding of this issue.

Firstly, it is worth remembering that in this context legal pluralism is to be understood as the coexistence of systems of social regulation that can be differentiated along cultural or ethnic lines. Thus, the general condition underpinning this legal pluralism is cultural plurality.⁵⁰ Secondly, legal pluralism in Chile was formally introduced through the Indigenous Act, *Ley Indígena* (n. 19.253), of 1993. This Act marked a real milestone in the Chilean legal tradition, as this was the first time Chile was officially declared a multi-ethnic country. Besides, the Indigenous Act is the first instrument to have recorded indigenous customs in writing.⁵¹ Thirdly, the second major legal instrument, referred to above, concerned the ratification of ILO Convention 169 (1989) in 2008. The Convention adopted a minimal regulatory standard regarding indigenous groups that states should recognise. As a result, since its entry into force (2009), the Chilean legal system has been challenged by the implementation of the different matters of the Conven-

48 See, generally, DEZALAY/GARTH (2002) 141 ff.

49 COOPER (2008).

50 YRIGOYEN FAJARDO (1995) 9–10; CABEDO MALLOL (2001) 307.

51 For more on this see MÍGUEZ NÚÑEZ (2016) 310. See also, critically, BOCCARA/SEGUEL-BOCCARA (1999) 700 ff.

tion, mostly on issues relating to indigenous customs.⁵² Fourthly, and last, since the Chilean Constitution of 1980 has not been modified to introduce the ILO Convention, the absence of a multiculturalism clause has generated a *special* situation of legal pluralism when compared to the constitutional standards of the region.⁵³

As a result of the above, the recognition of a so-called conservative pluralism,⁵⁴ or unfinished pluralism, as I prefer to refer to it, prevents the formal organisation of indigenous groups and hinders its systematic inclusion in the lawmaking process. Thus, the problem that arises with the introduction of ILO Convention concerns the requirement of full compliance with the international and comparative standards of legal pluralism. In this respect, the current debate on the new constitution, the implementation of the indigenous right to prior consultation, and the recognition of indigenous jurisdiction are three major issues in the ongoing discussion on legal pluralism in Chile.

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52 See, for instance, the juridical mechanisms for the recognition of ancestral water rights analysed by YÁÑEZ/MOLINA (2011) 139 ff.

53 See YRIGOEYEN FAJARDO (2011).

54 WOLKMER (2003b).

- BEDERMAN, DAVID J. (2010), *Custom as a Source of Law*, Cambridge
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Second Part

Tendencies

Section I

Diversity and Nation-building

National Identity through Diversity – Brazilian Nation Building Ideas and Theories, 1920–1948 (and their Aftermath)

1 Introduction

This contribution addresses a pervasive discourse on Brazilian national identity that could be understood as national identity through a double diversity. On the one hand, Brazil would be a country with a divergent and diverse path within the West: a curious *Sonderweg* (to use the German term, not without some irony). It would be full of historical, cultural, political and social “peculiarities”. This representation of Brazil, albeit usually attributed to local theories and ideologies, functioning almost as a “local dialect”, is pervasive in culture, social imaginaries and sociology both at home and abroad. According to this discourse, *however arguable it may be historically and sociologically*, Brazil would, thus, be *lacking* the elements that would have been central to the development of national identity and unity elsewhere, such as independence revolutions, bourgeois revolutions, symbolically shared political values and culture, homogeneous ethnicity, shared founding wars, integrating the middle class and the public sphere in a culture of rights and procedures, etc. Brazilian (and “Brazilianist”) sociology even states that this general “negative hypothesis” was so pervasive that it generated a “national-methodology bias” – a “sociology of inauthenticity” that was often searching for Brazilian “singularity”. It is not at all an overstatement to note that, both abroad and domestically, the discourses on Brazilian identity and its representation are pervaded by a discourse on Brazil’s fundamental otherness, or diverseness.

On the other hand, in these same discourses and representations, Brazil is thought to have singular *excesses*. The main one would be an excess of diversity, which would supposedly result in different outlines across the country. Brazil would be characterized by plastic, ever-changing, improvising melting-pot-like pools of unchannelled diversity. This would be especially true in culture and politics. This diversity would always maintain itself and live with

its antagonisms in a situation of (unresolved) accommodation of “antagonism equilibria”, to use the words of Gilberto Freyre. Personalism, patriarchy and slavery would go hand in hand with liberalism and bureaucracy; religions would fuse together in a syncretism; ethnicities would be singularly miscegenated and “mixed”, etc. In such representations, Brazilian national identity could, therefore, only be understood through this diverse explosion of diversity.

Such discourses found their way into Brazilian social sciences and gained momentum, especially at the time of the 1930s, when the theme of conflicting political representation models was on the agenda of world politics, and social sciences were starting to be institutionalized in the country. The question of Brazilian identity, long pervaded by the aforementioned discourses, gained central political relevance and renewed academic and popular interest. Some say that the issue of the “Brazilian national identity” and the vicissitudes of thinking a political representation, in and for Brazil, became the focus of the emerging social sciences of the period. These would have taken upon themselves the task of functioning as a “lighthouse” to guide the national debates on identity and representation across the land. Others argue that the emerging institutionalized sociology and political theory of the time did nothing more than incorporate and generalize gross stereotypes and popular (mis-)representations of Brazil. Be that as it may, this issue is not the focus of this contribution: its aim is the very recognition of the aforementioned discourse *and* its persistence (in Brazil and abroad). The aim is not to address, here, the theoretical coherence of the “sociology and social imaginaries” of Brazil at the time, but, rather, to point out that this very issue of Brazilian national identity, condensed around the 1930s, gained wide attention at the time and its aftermath still makes itself felt even to this day, *especially in the secondary literature, which, together with the wide impact of these ideas, contributed greatly to the formatting and dissemination of the notion of a “Brazilian national identity”*. Even more importantly, it should be noted that the books that will be analysed here are much more relevant from the standpoint of their reception (e.g. in universities and schools) and repercussions, and as examples of the issue mentioned above, than in their internal coherence.

From the 1930s onwards, the question of how to deal with “political diversity” – i.e. how to represent the diverse social groups in politics – was specially linked with notions of nationalism and national identity. In

world politics, one could see three main currents or modes of dealing with “political diversity”: (i) embracing plurality and the atomization of groups or interests by “intermediary powers” and impersonal subjective rights – pluralism/liberal democracy; (ii) centralizing power around the State and channelling representation through a corporative structure – fascism/corporativism; (iii) centralizing power around the State by class-structure representations of diversity – communism/socialism. Nationalism and national-identity building were, nevertheless, already long-established in the political history and debates of Europe. In the Brazil of the 1930s and 1940s, however, the main argument was that the country (still on the onset of its industrialization) could be characterized by “a lack or deficit” of modernization and national identity. A great deal of the debates at the time were centred on how to found the yet-to-be Brazilian Nation and its identity, for it was somewhat considered that the country’s “backwardness” was hindering its ability to “enter modernity”. This paper presents three variations of this thinking to sustain its main arguments, relating these variations to the above-mentioned three modes of dealing with political-diversity representation, in three monographies considered “classics”, which experienced a wide reception and attention: Oliveira Viana (fascism/corporativism), Sérgio Buarque de Holanda (liberalism/democracy), and Caio Prado Júnior (socialism/communism). The time frame is set from 1920, i.e. the publication of Oliveira Viana’s book, up to 1948, when the second edition of Holanda’s book came out.

In the first section, this essay presents its main arguments and develops the interplay of these discourses on national identity, as well as presenting some analysis of it. In the second section, the selection of the three books is presented as examples of the conclusions drawn in the first section. This discussion of the “three examples” is accompanied by some methodological considerations on the limitations and possibilities offered by their analysis. Third and lastly, some final considerations are presented.

2 National identity in a land with a diverse diversity: the “Brazilian singularity-thesis” viewed from both the outside and the inside

In his book, *Brasilien, Land der Zukunft*, Stefan Zweig asks himself why Brazil is not the “most divided, unpeaceful and troubled country in the world”. He does so from the perspective of the “standards of European

nationality”, and *with “great astonishment”*.¹ To him, the greatly diverse ethnic structure of the country he found himself exiled to during the Second World War should lead one to expect that all its existing groups would be in constant conflict regarding their “rights and privileges”. He refers to the overt visibility of diverse “races” that would “live together in complete harmony and, despite their individual origins, compete only in their ambition to get rid of their former peculiarities in order to become as quickly and as completely Brazilian as possible, in a new and unified nation”. He then concludes: “Brazil has – and the significance of this great *experiment* seems to me *exemplary* – made a mockery of the racial problem that is unsettling our European world in the simplest possible way: by simply ignoring its supposed validity.”²

After his visits to some *favelas* in Recife, Brazil,³ sociologist Niklas Luhmann stated:

“To the *surprise* of the well-meaning, it must be ascertained that exclusion still exists, and it exists on such a massive scale and in such forms of misery, that they *are beyond description*. Anybody who dares a visit to the favelas of South American cities and escapes alive can talk about it [...]. Whoever trusts his eyes can see it, and *can see with such impressiveness (Eindrücklichkeit)*, that all explanations at hand will fail.”⁴

This “impressiveness” reflects itself in the “impressionistic style” of his writings on the matter,⁵ which is something quite unusual for him. This is most evident in the recollection of his walks through the streets of Brazil’s big cities.⁶ The patterns of sociality of this diverse country would result, in the

1 “*Zum größten Erstaunen*”. All translations, when not stated otherwise, are mine. All emphases have been added.

2 ZWIG (2013) 8–9.

3 For Luhmann’s theoretical reaction to dealing with the “social exclusion problem” in his theory, especially after his “travels” to Brazil and contacts with researchers from Latin America, see RIBEIRO (2013).

4 LUHMANN (1999) 141.

5 See only OPITZ (2008) and FARZIN (2008).

6 “When, for instance, one visits Brazil’s big cities and moves through its streets, squares and beaches, it demands from one an indispensable social competence [consisting] of a constant observation of the positioning, distancing and gathering of human bodies. One can feel one’s body *more than usual*, one lives more than usual inside of it. [...] There is much more of a form of intuition-driven perception, which contributes to the perception of dangers and to their avoidance. [...] All of that, which we would apprehend as a person, falls back, and, with that, also all the attempts to achieve social effects by influenc-

end, “in the *immobilization* of politics, the economy, the law, social mobility and, even, of the academic system”.⁷ Notwithstanding his overt appeal not to “*exoticize*” or singularize social relations in Brazil,⁸ many criticize him for doing precisely that.⁹

Ulrich Beck takes this sociologically astonished impressiveness in relation to Brazil even further by developing his dystopic theorem of the “Brazilianization of the West”.¹⁰ He admits using “exacerbation” (*Zuspitzung*) and a “negative stereotype” (*Negativschablone*) to present Brazil as a “contrasting case” and to analyse inequality in Germany. The *Brazilianization* of the West would mean that forms of work and life that are typical of the South would spread to the centre: plasticity, improvisation, a “patchwork carpet” of precarity, and a multi-activity structure of work (“feminization”) and confusion, resulting in a place where no full employment is conceivable. In a somewhat counter-intuitive turn, he then changes the dystopic colours of his Brazilian image to almost avant-garde ones. Brazil is presented both as a warning and as guidance in connection with the problems affecting the “late-modern lands” (*den spätmodernen Ländern*). In a “head inversion”, undeveloped Brazil (this profane “place of inversions”, of mixed and confused diversity), would serve as an orienting “glimpse” into the future of the “Brave New World of Labour” looming in the West, alongside its risks, networks, plasticity, hybridism and flexibilization.¹¹

ing attitudes.” He then goes on, in a footnote, to address “*new forms*” of sociality and the *rapidness of adjusting to “occasions”*, something that would be relatable to the popularity of soccer, LUHMANN (1995) 245–246. For Luhmann’s soccer metaphor for sociality, see LUHMANN (2000). SCHWARCZ/STARLING (2015) 16 also refer to “soccer” as the greatest metaphor for Brazilian “nationality”, representing precisely this widespread notion of an “improvisational aspect” in Brazilian “national culture” and the constant expectation that “something almost magical” would happen to resolve the match.

7 LUHMANN (1995) 226–227; 231–232.

8 LUHMANN (1992) 3–4.

9 For a warning against a supposed “fascination with the exotic” in Luhmann’s “inclusion-exclusion” theory, see NASSEHI (2004) 323 f.

10 BECK (1998) 266 f. and (2007) 138. This use of the “Brazilianization-theorem” is not exclusive to Beck, see e.g. LIND (1995) and DAVIS (2006). For an essay considering, among other themes, the imaginaries of Brazil in social theory, see ARANTES (2004). Included therein is also a critique of Beck’s (and others’) “Brazilianization” argument.

11 BECK (2007) 28 f., 127 f., and 138 f.

These passages should suffice to illustrate the “fascination” that the supposed idiosyncrasies of social relations in Brazil generate. Brazil, a “different world within Latin America”,¹² is hereby viewed from the outside as “diverse” in a twofold manner. Firstly, Brazil would represent a fundamental diverse-ness, or otherness, within the “West”, usually referred to as an “example” and pointed out as a “singularity”, for better or for worse. Secondly, Brazil would be characterized as being greatly diverse itself, as a melting pot of ethnicities, beliefs, institutions, cultures and social groups, without any clear homogenizing principle or element, i. e. where the very maintaining of such diversity would constitute its identity. Diversity then becomes permanent and unresolved, assuming the form of a “mixture”: a “land of inversions”, as Beck put it, or of “fascinating (difficult) paradoxes” and ambiguities,¹³ or, to quote Gilberto Freyre, a land of “antagonism equilibria”.¹⁴ To put it crudely, Brazil would find its national identity in maintaining its “diversity” as “mixture”, i. e. without resolving or organizing it, but leaving it open and permanent, in a plastic, improvisational and “singular” way.¹⁵ This “discourse”, however,

12 See SKIDMORE/SMITH (1999) 32 ff. Such designation would have started already with the contrast between the Portuguese and Spanish colonies, but would also reflect the differences in the organization of the native indigenous people, the economy (slavery and latifundia), the language and so many other factors.

13 SKIDMORE/SMITH (1999) 15.

14 FREYRE (2003).

15 If we borrow some remarks from VIVEIROS DE CASTRO (1992), this could possibly be illustrated by going even as far back as the Jesuit literature of the 16th century. With great resonance even “outside missionary reflections”, the idea of a certain “way of being (*modo de ser*)” of the society of the indigenous people, “the *Tupinambá*”, in Brazil, was understood as “the *inconstancy* of the Indian Soul”. This could be illustrated by the famous metaphor (brought about by António Vieira in 1657) characterizing the *ameríndio* as a “garden myrtle statue”, i. e. easily shaped, adaptable and flexible, but unable to retain its form in the long run, quickly returning to its “savage” constitutions and to hybrid, unstructured states of mixtures. In contrast, the European would be a “marble statue”, hard to shape, but consistent in retaining its form. Such representations found their way into Brazilian historiography, which sometimes considered the *índios* “incapable” of notions of order, or constancy, see, in English, the book, VIVEIROS DE CASTRO (2011). This could be loosely related to some contemporary considerations. The widespread representation of a peculiar Brazilian “way of being” (*jeitinho brasileiro* – “a little way of always finding a way out”) has also (polemically) found its way into academia (influentially: DAMATTA (1997). This “*jeitinho brasileiro*” would imply a social ethos of being laxer and more creative with “rules”, and, thus, often circumventing, subverting, bending, or adapting them. One should concede, however, that there is a classic “world figure” of the “trickster” in literature and

is not only an external or foreign one, but one that is also (and maybe more prominently) present and pervasive domestically.

This could be summarized in the words of Lilia Schwarcz and Heloisa Starling:

“The country has always been defined by the gaze that comes from the outside. Since the 16th century, when ‘Brazil’ was not even ‘*Brasil*’, but a deeply unknown Portuguese America, the territory was already observed with a considerable amount of curiosity. Considered to be the ‘other’ in the West, Brazil seemed represented sometimes by stereotypes that characterized it, on the one hand, as a great and unexpected ‘*lack*’ – of law, hierarchy, rules – and, on the other, as an ‘*excess*’ – of lust, sexuality, leisure, or parties.”¹⁶

The authors have even claimed that “Brazilian history itself aspires to be a *mestiça* [“*miscegenated, half-breed*”], as Brazilians themselves seem to be. [...] By mixing colours and customs so much, we have made the *mestizaje* a kind of national representation.” Accordingly, there would be a corresponding “national ethos” of plasticity and spontaneity of a land with a “mixture without equal” that would define Brazil by a quite specific “(cultural) diversity”, resulting in a “miscegenated soul of the country”.¹⁷

It may be somewhat puzzling to speak about “looks that come from the outside” when considering a theme so local as the notion of a “Brazilian singularity or exceptionality thesis”.¹⁸ Indeed, such discourses on national

culture, in relation to which the Brazilian social type, “*malandro*”, could be considered a local variation, see CÂNDIDO (1970). Let it be noted that such “social types” are also usually present in other Latin American stereotypes beside the Brazilian one.

- 16 The authors also reinforce the persistence of such discourse, or representation: “In the propaganda, in the speeches that come from abroad, the country is still understood as a hospitable place, of exotic values, and where one can look for a kind of universal native, since one would find here a ‘summary’ of the ‘strange’ peoples of all places”, SCHWARCZ/STARLING (2015) 18.
- 17 SCHWARCZ/STARLING (2015) 14–18. In this book and in other studies, the authors emphasize the fact that such “mixture consolidated itself in violent practices, of forced entry of peoples, cultures and experiences in national reality. Much different from a notion of harmony, such mixture was, here, much more a matter of arbitrariness [...]. Far from the image of a peaceful [...] country, or of a racial democracy, the [history of Brazil] [...] describes the vicissitudes of this nation, which, albeit deeply mixed, has, alongside this – and at the same time – a rigid hierarchy conditioned by internally shared values, which functions as a social language in itself”, SCHWARCZ/STARLING (2015) 20.
- 18 Theories and explanations that are peculiar to Brazil and its supposed “singular” social relations result in heated discussions in politics, academia, and even popular culture. Such explanations have symptomatically received the popular, pejorative term of “*Jabuticaba*”

idiosyncrasies, which tend to characterize Brazilian national identity, assume controversial and explosive relevance domestically. One could concede that “national-identity discourses” assume cultural and political prominence in almost all countries of a “recent colonial past” and become almost an “obsession”, often returning to the agenda, thereby assuming the form of a somewhat complex “local dialect”.¹⁹ This may be the case for Brazil, where one could note a confluence of such “national-identity discourse” permeating culture, politics, social theory and art.²⁰ In the following, we shall address some elements of the aforementioned “discourses”, which, albeit internally highly polemical in nature and scattered throughout different disciplines and “lineages”, do indeed converge at certain points.

Firstly, there would be the issue of the essentialist representations of “Brazilian (political) culture”. For many reasons, the Brazilian people would be fundamentally peaceful, averse to open conflicts, living in “harmony” and in a festive celebration of diversity, without any need for clear-cut separations or resolutions. This notion, heavily criticized under the label of the “myth of the racial democracy”,²¹ would go hand in hand with the notion that, in Brazil, there would follow a “multi-secular immobilism” in politics “since

explanations”. The notion implies that the plant, *Jabuticaba*, would only exist in Brazil, emphasizing the heuristic bias to overstate Brazilian peculiarities in politics, culture and academia. The term is widespread, but received even more attention after the publications by Brazilian diplomat Paulo Roberto de Almeida, e. g. ALMEIDA (2005).

19 SCHWARCZ/STARLING (2015) 17.

20 For literature, see in priority the illustrative text of CÂNDIDO (1970) and “*Movimento antropofágico*”.

21 This refers to the national-identity myth of a “racial democracy”, of supposed “social harmony” and “peaceful miscegenation”, and to the assumption that, in Brazil, there would be no “racial pride” (HOLANDA (1995) 53), something that the social sciences and the Black Movement in Brazil have struggled to debunk (see, for an overview, among many, SCHWARCZ (1998) 128 f., and 202 f.). On race, and the concept of a “spectacle of races” and “laboratory”, analyzing representations of Brazilian “racial issue”, both in Brazil and abroad, see SCHWARCZ (1993) esp. 11 f. Schwarcz reminds us that this “myth” was pervasive both internally and externally, and that even UNESCO funded, in 1951, a study on racial relations in Brazil, where the premise of a “racial democracy” was pre-emptively contested by the sociologists of the country. For an overview in English, encompassing analyses of Brazilian social thinking and culture, see STAM/SHOHAT (2012) esp. 31 f., and 185 f. Internally, this “myth” was extensively spread also by the State, especially under the military regime (1964–1988), in a political interpretation of history that aimed to block subversive and “un-Brazilian” conflictive representations of memory. One could say that

the arrival of Pedro Álvares de Cabral in 1500”.²² In this sense, political structures and institutions in Brazil would never suffer drastic changes, in a country where “accommodations” would always be preferable to political resolutions or “real political change”.²³

Secondly, more than these culturalist formulations,²⁴ there would be other elements in Brazilian sociality that would seem to condition its “experience with modernity”. These could be found as a result of “influential magnitude”, both inside and outside academia, of “constructions of institutionalized Brazilian social sciences”, and in the “diffusion of images and self-perceptions” in Brazil. Such themes are present even now, with many studies arguing that modernity, in Brazil, would always be qualified: selective, epide-mical, conservative, State-centred, peripheral, etc. Brazilian “singularities” would, in some measure, oppose those elements that would characterize modernity, i. e. functional differentiation, secularization and separation

the “racial democracy” myth was, somehow, part of a “culture of remembrance” (*Erinnerungskultur*), of denying the violence of the “representations of the past” to also curb conflicts, see ASSMANN (2013), especially her debate with Koselleck in 16 ff.

- 22 For a critique of this argument, see: SANTOS (2017) 139. See also REGATIERI (2020).
- 23 This persists, even though Brazilian history is permeated by “rebellions, revolts and manifestations from all sides”, SCHWARCZ/STARLING (2015) 18. The comparison of Brazilian Independence with its Latin American counterparts is usually the starting point. Nevertheless, there are many studies of legal and political nature that seem to show many such continuities despite institutional change. For the “continuity” of a corporatist structure in the Brazilian labour-union system after 1945 and a comparison with the changes occurred in Italy, Spain and Portugal, see the compelling study by MASSONI (2010). For the continuities of administrative structures of the “Estado Novo” after 1945, see CAMPELLO DE SOUZA (1976). Such debates are still very much alive, for instance, in the sphere of transitional human rights, where Brazil’s “differing path” (with its Amnesty Law) would be a case of this accommodational politics, and in the popularly spread notion that the Brazilian Constitution of 1988 would be the patchworked result of a broad political “accommodation” of diverse social groups and would, therefore, have lost some of its normative power. Incidentally, such arguments appear to have bolstered the – quite surprising, to say the least – proposal for the calling of a new Constituent Assembly for Brazil in 2023 by constitutionalist Bruce Ackerman: ACKERMAN (2020).
- 24 Such cultural determinism, of many variants and origins was even called a sociology of “ata-vistic culturalism”, SOUZA (2000). Nonetheless, see also compelling critiques of Souza’s model and the idea of “selective modernity” in TAVOLARO (2011) 26ff, and the views of NEVES (2006) 247–248 that not all centre/periphery arguments forcibly imply a “cultural anthropology”, in which he develops a model of peripheral modernity that distances itself radically from such culturalisms.

of the public and private spheres.²⁵ Here, there would be two main lineages: a sociology of “patriarchal-patrimonial inheritance”²⁶ and a “sociology of dependence”. Whereas the patriarchal-patrimonial (or personalism) analysis considers that these forms would stem from the Iberian legacy brought by Portuguese colonization, fomenting a “diverse” type of sociality differing from that of the “central countries of modernity” (as we shall see below in Buarque de Holanda’s version), the sociologies of dependency (whose “example” we shall see with Caio Prado Júnior) emphasize economic conditions and asymmetries, especially the case of the colonial enterprise and slavery in Brazil, focusing on the peripheric condition of the land in a global system and its social exclusion.

In the 1930s and their accompanying “wave of modernization”, the national-identity question became not only an issue of relevance for social theory or cultural representations, but thereby acquired a distinct political colouration. One could argue that the period between 1930 and 1945 was one of dispute between three main models of political regime, i. e. fascism-corporativism, liberal democracy and socialism / communism. In such a context, the discussions of the “Brazilian national identity” and its “specificities” gained momentum. Coinciding with the institutionalization of social sciences in the country, numerous publications with an essayistic style and a plural configuration would centre around such issues in a period often called the “classics of Brazilian thought”, aiming to develop “interpretations of Brazil”.²⁷ Furthermore, as we have seen above, the wide-spread notion (*however academically arguable it may be*) that Brazil is a diverse country characterized by peculiarities and without a shared “unifying” national identity trait (such as shared imaginaries of a political constitution or an ethnically homogeneous population) also fuelled the debates in the search for the Brazilian national (and political) identity.

25 See TAVOLARO (2011).

26 REGATIERI (2018) presents a compelling comparison of the patrimonialism-personalist thesis, with influences of Max Weber’s theory, as applied to Brazil and South-Korea, and shows how it was mobilized in both countries: for Brazil, through the Iberian heritage, and in South-Korea through the legacy of its Confucian ethics, both departing from a “singularity thesis” and explaining how this construction, in both contexts, was used to represent a “separation” of these countries from the modernity “of the rest of the world”.

27 BRANDÃO (2005). Incidentally, the very use of the terminology, “Brazilian social thought” or “Brazilian political thinking” – being used instead of “sociology” or “political theory” – is also criticized in literature. See, among many, DOMINGUES (2011) *passim*.

With the centralizing “*Estado Novo*” of the 1930s, there was a great increase in nationalism, bureaucracy-building and centralization. Even now, many say that the “entering” of Brazil into modernity began in that period, even though this is disputed.²⁸ In any case, the issue of “forming” the people and the nation was at the centre of the debates. A great deal of thinking was centred around the notion that Brazil did not have an ideal, active people – something said to be a permeating trait of Brazilian political and social thought, even gaining the label of the “negative hypothesis”.²⁹ In Brazil, one would only find a passive people that had only “watched, besetialized” independence;³⁰ a people yet “in need to be formed”, something that could be done, e. g. via State centralization, which would integrate and constitute the people, who, at the time, were considered to be nothing more than “amorphous masses”.³¹ The underlying assumption that the 1930s would be the characterizing milestone of the “late entry” of Brazil into modernity is still present in contemporary studies, especially when addressing Brazil’s singular path to citizenship and fundamental rights.³² Indeed, these issues and debates long predate the discussions of the 1930s, but it was then that they assumed clearer contours of differentiated social thought.

One could, therefore, argue that such “explanations of Brazil”, mainly due to the influence of the sociological essay-style of the 1930s, were focused on

28 See TAVOLARO (2011) 56 f.

29 BRANDÃO (2005).

30 CARVALHO (1987).

31 VIANA (1973) esp. 123 f.

32 As in CARVALHO (2001). One of the key issues was the “construction of a modern citizenship” in the period. At around the time of Getúlio Vargas’ Government, Brazilian singularity was later described in comparison to T. H. Marshall’s theory of citizenship formation and in debates following the “chronological” order of civil, political and social rights. Some studies on models of democracy pointed to the idea that, instead of a citizenship (*cidadania*), the Brazilian “path” would rather imply, in contrast, a “statezenship” (*estadania*) in “a top-down non-participatory model”, CARVALHO (1996 and 2001). This top-down model, with some level of guaranteed social rights coexisting with elevated levels of political repression (lack of political rights) and with the suffocation of autonomous civil-society organizations, could characterize the realm of politics in Brazil as “drowned in laws”, FRENCH (2004). Nevertheless, the idea that the Vargas period would be a key feature in shaping citizenship and political culture in Brazil could also be countered for being an “hegemonically shared discourse”, alongside explications of great historical tendencies that followed “economic dependency” and “patrimonial-patriarchal inheritance” in determining political sociability in Brazil, TAVOLARO (2011) esp. 192.

the specificities of the country and were characterized by the expropriation of “themes and problems” that led authors to “explore certain perspectives of reading the past” in search of the national identity.³³ Many of these explanations were characterized by references to crystalized remnants of the past, in historical continuities that worked as broad and totalizing explanations. They usually highlighted the anomalous, pre-modern and backward character of Brazil, mainly in comparison with “European societies” – e.g. the analysis of the national character through the Iberic ethos³⁴ and the public ethos, in order to describe the failure to constitute a collective public space in the country.³⁵ “Brazilian social thought”³⁶ also comprised different and opposing political agendas that centred around a shared problem: founding the Brazilian nation and pointing out blockages and challenges for its “modernization”. Some say this later spread to a broad spectrum of Brazilian academical research, resulting, in the end, in a “nationalist methodological bias”.³⁷ And, as we have seen above, this also made itself present outside both academia and the country itself. The background issue was, thus, not only the theoretical explanation of Brazil, but also the politically oriented description of the nation with regard to the problem of facing up to its “backwardness” or “diverseness” in order to insert itself into modernity, i. e. serving as a “*lighthouse*” to national identity and political thinking, and to the task of “*imagining our nation*” and “our modernization projects”.³⁸

It should be noted that this seems to be a constant not only in Brazilian sociology. Mascareño and Chernilo³⁹ argue that the search for these answers, which makes Latin America simultaneously modern (universal) *and* Latin American (particular), is also a characterizing feature of Latin American sociology. This can be otherwise understood as a background problematic that has stimulated many different approaches – politically, theoretically and culturally.⁴⁰ Therefore, it is not only a matter of simply stating that this

33 LAVALLE (2004) 69–70.

34 See VILLAS BÔAS FILHO (2009) 187 ff.

35 See LAVALLE (2004) *passim*.

36 BRANDÃO (2005).

37 DOMINGUES (2011) 8 and 89.

38 SANTIAGO (2002) xxii.

39 MASCAREÑO / CHERNILO (2009) 85 f.

40 For a supplementary epistemological approach to these issues, instead of a more political one, see RIBEIRO (2013).

debate would be one of “misplaced ideas”⁴¹ stemming from the centre of modernity to the “periphery”. When analyzing the tension between universalism and particularism, the authors address the question of the ambivalent manner through which Latin American sociology dealt with the modernity issue, associating, on the one hand, its identity to national borders and its “immutable cultural ethos” and, on the other, adopting the more general and abstract sociological theories from various conjunctures, created and devised for periods and contexts that were different from the Latin American ones. According to the authors, no argument is to be made in the sense of a total impossibility for Latin American sociology to both consider its empirical specificities and tackle the demands of a “universally oriented knowledge of the sociological canon”. Their argument is, rather, to recognize that both a position that focuses only on particularisms, and another that would focus only on generalizations are themselves unattainable.

Be that as it may, such discourses on “national identities” and “singularities” can, of course, be academically questioned and criticized. That is even more so if we consider that such discourses are understood to be persistent in academia – foreign and Brazilian – until today. This has already been verified, not only by studies of post-colonialism or decolonialism, or even by models of the circulation of political ideas or ‘translation’ of legal and political institutions, but also within Brazilian social sciences themselves, especially after the 1990s.⁴²

Nevertheless, the presence and pervasiveness of such discourses on Brazilian idiosyncratic “diverse diversity” in the country’s social relations seem to be out of the question. Whether social theory (or “Brazilian social thinking”) influenced such “national-identity discourses”, working as an orientation and a guiding beam, or “lighthouse”,⁴³ or if it is otherwise, meaning that social

41 SCHWARZ (2005), recognizes “misplaced ideas” – i. e. political ideologies outside their original centre in the European context – as a constitutive feature of the “Brazilian national character”. His views attracted much criticism because they did not take into account analysis issues linked to the social structure of “Brazilian society”. See e. g. VILLAS BÓAS FILHO (2009) esp. 195 ff. For a reply explaining “misunderstandings”, see SCHWARZ (2012), and RICÚPERO (2008) 64–65 and 68. The latter highlights the element of tension between “form” and “environment” in Brazilian social thinking, stating that there were necessary “torsions” of borrowed forms that the periphery took from the centre.

42 See BRANDÃO (2005).

43 SANTIAGO (2002).

theory was only reproducing gross popular generalizations,⁴⁴ is not the issue to be discussed here. Their confluence, however, seems to be strikingly symptomatic. More importantly, one hopes to have shown that these “homogeneous discourses” on Brazil’s double diversity were constitutive of the thematization of national identity. These should provide the context for the analysis that follows.

3 Three examples: Oliveira Viana, Sérgio Buarque de Holanda and Caio Prado Júnior

In the 1920s and 1930s, there was a growing visualization in world politics of three modes of political representation, i.e. how to represent the diverse social groups in politics: (i) embracing plurality and the atomization of groups or interests by “intermediary powers” and impersonal subjective rights – pluralism / *liberal democracy*; (ii) centralizing power around the State and channelling representation through a corporative structure – *corporativism / fascism*; (iii) centralizing power around the State through the class-structure representation of diversity and through the control of the means of production – *communism / socialism*.

These debates and concurring representation modes of political regimes were themes of world politics and also took place in Brazil. In the following, a selection of three authors that were (and still are) linked to thinking about the “adaptation” of these regimes “to Brazilian singularities” is examined. They are Francisco José de Oliveira Viana, Sérgio Buarque de Holanda, and Caio Prado Júnior. One book by each author was selected, based on its being considered a “classic”, its reception, its diffusion in Brazilian literature, and its focusing on political thinking and political projects in Brazil (see, for this definition of “political Brazilian thought”).⁴⁵

Before that, some preliminary considerations are due. It must be clearly stated that these authors are not to be presented, here, as coherent advocates of such political projects, nor are they to be analysed through the lenses of theoretical coherence. The somewhat eclectic (essayistic) style of these works already attests to this. It is not a question of analysing such ideas through the lenses of theoretical purity or point-by-point equivalence of such political

44 SOUZA (2000); REGATIERI (2018) 377.

45 FAORO (1994).

regimes. The “political reading” of these books and authors, and the emphasis on the political relevance of their considerations on “Brazilian national identity (and diversity)” can actually be attributed much more to the aforementioned background, historical context and later anachronic projections of the debates on the still pervasive question of Brazilian national identity in academia and elsewhere – as we tried to show, above.

The aim, here, is to present these three authors against the background of our considerations above, and mainly filtered through the *reception* of their works, which acquired later the aura of classics of Brazilian social thought concerning State theory and political projects. It could even be said that such “political reading” of the books is more a creation of the secondary literature, ascribing these political overtones to them afterwards. This may also be due to the success of these works, their wide reception, and their inclusion in the institutional syllabuses of universities and schools in later decades. It is precisely this “reception”, however, which justifies the selection of these books for this presentation.

In such a context, the considerations of Oliveira Viana on the centrality of the State and, even, his political and institutional relevance in the *Estado Novo* are not to be understood, here, as a theory of corporativism, especially because Viana constructs his arguments under the notion that others have called “instrumental authoritarianism”, and justified his project by the notion of preparing Brazil for democracy. In turn, Sergio Buarque de Holanda, when addressing the Brazilian Iberic ethos, draws on Max Weber and Carl Schmitt in the same breath to develop the notion of the “cordial man” (see below), i. e. in order to represent the average Brazilian’s imperviousness to impersonal rules and a tendency to rely on networks of friends and favours. Moreover, he also develops arguments of a specific type as to a Brazilian democracy that should emerge from “molecular revolutions” – something that cannot be understood only as a sociology of “inauthenticity” (Souza, 2000), or as a mere copy or adaptation of “misplaced ideas”. And there are many critiques stating that Caio Prado Júnior, later characterized as a relevant figure of Brazilian communism, “had never even read Marx”.⁴⁶ Even the more empathetic commentators of Prado Júnior’s work openly assume this to have been the case.⁴⁷ This, however, could highlight and

46 See e. g. COUTINHO (1989).

47 See RICÚPERO (1998).

support our claims, instead of rebutting them. Caio Prado Júnior's later political reception and his importance to the political debates of the Brazilian communist left stand out as the most noticeable aspect. Prado Júnior was even praised as "the first Brazilian Marxist".⁴⁸ Once again, the critique of his arguments is not what is at stake here, but, rather, the acknowledgement of the wide reception of his work, to help us think about the vicissitudes of a communist and socialist project for Brazil. The wide reception of his books in the subsequent decades (even if he had not read Marx at the time) only corroborates the argument that Brazilian national-identity issues prevailed over more theoretical concerns.

Of course, this selection of books and authors is severely limited. It deals with books that had a greater *political* reception and focused on the national-identity issue. We have no intention to present a comprehensive review of the books in full, but only to pinpoint the elements in them that can illustrate our arguments above.

Another limitation is the time frame. Oliveira Viana's *Populações Meridionais do Brasil*⁴⁹ was published in 1920. Caio Prado Júnior's *Formação do Brasil Contemporâneo* was published in 1942.⁵⁰ Sergio Buarque de Holanda's *Raízes do Brasil*,⁵¹ however, was published in very different editions, the first of which came out in 1936. Greatly edited and augmented second and third editions followed in 1948 and in 1956.⁵² Nevertheless, even though those

48 RICÚPERO (1998).

49 Here cited as VIANA (1973).

50 Cited as PRADO JÚNIOR (1996).

51 Cited as HOLANDA (1995).

52 As it is widely known, there are differences in content and tone between the first (1936) and posterior (1948, 1956, 1969, etc.) editions. Holanda's "democratic and liberal" configuration is, indeed, more present in the later editions. In the first edition, the use of the theories of the "antiliberal" Carl Schmitt (albeit punctual) and others seems to play a greater role and was diminished in the others. LEOPOLDO WAIZBORT, for instance, shows how the German Conservative Revolution influenced Holanda during his time spent in Germany and this was reflected in the first edition of the book (1936), even if he did not subscribe to the notion of a strong organic State in its Brazilian adaptation. Waizbort (and others) contrasted a book with somewhat more "organic" and "antiliberal" overtones in its first edition (1936) with a more clearly revised, liberal second edition (1948). This would be most visible when analysing the *deletions* and *omissions* of passages and names of a conservative nature that were made between the two versions. Moreover, Waizbort points out that the reception of this book (also in universities, schools and in its wider circulation) was great, but the addition of introductory remarks by literary critic Antonio Cândido

editions came after the Second World War, it can fairly be argued that the *issues* that shaped the book in all its versions were inspired by questions stemming from the period of the writing of its first edition. Furthermore, our considerations above should make it clear that there is a continuity of such “discourses on national identities” in the following decades. Anachronical readings of such texts in contemporary discourses are a feature of the debate and should function, here, as strengthening the argument that not only the historical context of these works is relevant, but also the aftermath of these discussions, often readdressing such works whilst addressing the issue of the national identity of Brazil.

Here, as we saw before, the discourses on Brazilian diversity and singularities assumed (for good or ill, correctly or as stereotypic generalizations) the “*negative hypothesis*” of the *lack* of social elements of modernity – something that became relevant to thinking about nation building from the 1930s onwards. This was reflected in the idea that national unity and homogeneity could not be presupposed in Brazil, which had (as the widespread notion goes) none of those elements that seemed to be relevant to nation building in other parts of the globe: no homogeneous people; no true politically constitutive moment of independence, nor defining war; and no cultural homogeneity, or even a middle class. Having “*lacked*” a bourgeois revolution, Brazil also lacked a public sphere and a culture of rights and procedures, so dear to modernity. The social requirements of nation building seemed to be missing and had to be searched for, or created.⁵³ Moreover, the specific, unorganized, and mixed (or “amorphous”) complexity of Brazilian society was also thought to be a problem of “*excess*”: excess of unorganized diversity; excess of personalism and affections; and excess of social gaps and inequalities that generated social, spatial and economic inequality.

dido in the fifth edition (1969) greatly influenced the readings of the book, presenting Holanda as a radical democrat and smoothing away the book’s internal contradictions. See the arguments in WAIZBORT (2011). Even so, and this is important, Waizbort and others state that they are presenting an interpretation of *Raízes do Brasil* that is “*swimming against the current*” of its conventional and widespread interpretation. For our purposes, here, as stated above, it is the circulation of these books and their popular reception, and *not their relevance to the academic debate or theoretical elements*, which are the object of our analysis.

- 53 It should be once again stated that this “hegemonic discourse” is academically highly debatable. Nonetheless, that is not the issue at stake, here. The point is much more that its relevance, persistence and pervasiveness seem to be undisputed.

3.1 Oliveira Viana

In his work, *Populações Meridionais do Brasil*, vol. 1, Oliveira Viana makes the effort to develop a theory that takes into account the peculiarities of the Brazilian case, and he does so in direct opposition to the liberal “constitutional idealists”, who would elaborate mere transposed copies of theories imported from beyond the seas.⁵⁴ Such work had a great repercussion in academia and politics,⁵⁵ mainly in the wake of the conditions created by the Revolution of 1930. However, tainted by Viana’s participation in Vargas’ government and his support for the 1937 dictatorship, the influence of his work declined afterwards and opposition to it grew, especially after his death in 1951, and with the posterior alleged appropriation of his thought by the military dictatorship (1964–1985/88) and its ideology. Thus, José Murilo de Carvalho categorically states that, along with his racist theories, “Oliveira Viana was sent to hell” – meaning, here, oblivion and condemnation.⁵⁶ Carvalho sustains the metaphor and affirms that Oliveira Viana is still there (in hell), but he (Carvalho) would nevertheless pay him an “unarmed visit”, not in the sense of removing him from over there, but of “bringing to light his main contributions to Brazilian political thought”.⁵⁷ It could be stated that Oliveira Viana’s reflections faced up to the problem of the organization

54 The considerations regarding racial and evolutionist aspects of his work are not the focus, here, such as the influence of authors such as Gustave Le Bon and Vacher de Lapouge, and, in Brazil, the influence of Alberto Torres’ works, see CARVALHO (1993) 17–18. Bernardo Ricúpero argues that Oliveira Viana acquires from Le Bon the idea of a “soul of the race”, constituting a “national character”, and that different “races” would differentiate themselves from one another both by psychological and physical characteristics. Even though Oliveira Viana admits that there is a certain “hierarchy” among them, he does not incorporate the “protagonist aspect of the Aryan race”, see RICÚPERO (2007).

55 So that, in the preface to the fourth edition of the work (1938), the author states: “I would like to highlight a point. The theses defended in this book and the conclusions that were reached in my objective study of our social and political formation have acquired splendid and integral consecration, both here and abroad, in the agitated period in which we live today”, VIANA (1973).

56 CARVALHO (1993) 14.

57 He further states his undeniable influence “on almost all main works of political sociology produced in Brazil after the publication of *Populações Meridionais no Brasil*”. This work would even “echo in authors that strongly disagree with his political views, with a long list: Gilberto Freyre, Sérgio Buarque, Nestor Duarte, Nelson Werneck Sodré, Victor Nunes Leal, Guerreiro Ramos, Raymundo Faoro, [...] and even Caio Prado [Júnior]”, CARVALHO (1993) 15.

and direction of society and the State. Brandão states that, “if the racist archaic garbage is discarded”, interest in the text should be preserved and this work could “appear in a selection” next to *Casa Grande & Senzala*, by Gilberto Freyre, *Raízes do Brasil*, by Sérgio Buarque de Holanda, and *Formação do Brasil contemporâneo*, by Caio Prado Júnior, as one of the foundational texts of what has conventionally been called Brazilian “political thought” or “Brazilian social thought”.⁵⁸

Oliveira Viana’s starting point was evolutionist and, within this framework, he also made use of physical anthropology when seeking to recognize national identity through its specificity. He developed types of environments and types of societies in Brazil as analytical instruments. However, critical of what he called “utopian idealism”, i. e. of the attempt at institutional transposition by the liberals, Oliveira Viana belongs to the theoretical line of the organic conception of politics. He thinks along “realistic” bases, starting from Brazilian society in its specificities, and then opposing them to the needs of other countries such as the United States and England. He analyses three types of Brazilians in three types of environment, concluding that it would be necessary to develop a rural sociology of Brazil.

In *Populações Meridionais do Brasil*, the author basically analyses the south-western region of Brazil, in which he finds the seat of political power. This would be a region “of the woods (*mata*)”, its inhabitants, therefore, being the “*matutos*”. With this division based on the size of the country and the *lack of unity* of the Brazilians, we can already see beforehand that Oliveira Viana did not presuppose an element of nationality in Brazil. In fact, in his analytical key, the author considered a plurality of explanatory elements, but reserved considerable space for the element of the environment. For Oliveira Viana, there were no fixed social types, but fixed *environments*.⁵⁹ This premise is important to understand why the author places the rural as the locus of Brazilian nationality.

From the very beginning, Oliveira Viana states that the first colonizers who came to Brazil were people linked to the “most illustrious branches of the European nobility”. They would be like a transplanted court in the wilderness of a South American territory. Therefore, the arrival of these settlers characterized by urban habits alongside their *centripetal* tendencies

58 BRANDÃO (2002) 302.

59 VIANA (1973) 29 ff.

(the “European tendency of urban and political centralization”) would clash with the *centrifugal* character of the Brazilian territory, in all its extension and rurality. The author affirms that these settlers could not adapt to Brazil – a very different place.⁶⁰

According to the author, the second group of settlers who arrived had “more plebeian” origins, and consequently had greater capacity for adaptation, combined with the “psychology of the country man”. The environment stood out, and the adaptation occurred. There was, then, the prevalence of the environment over the social type, with the large property, in the form of the latifundium, being the instrument for implementing this process. According to Viana, “the rural environment is, everywhere, an admirable conformer of souls”.⁶¹ This “adaptation” of the social type to the environment is the process he calls latifundium-mediated ruralization:

“We said that, in the fourth century [*Oliveira Viana counts up from 1500*], the Brazilian population is completely ruralized. In fact, this forced the need for a permanent presence in the agricultural latifundium, which ends up generating, within colonial society, a state of mind in which rural living is no longer a sort of trial or exile for the upper class, as it once was, but becomes the very sign of noble existence, a proof even of distinction and importance. [...] Indeed, at the dawn of the fourth century, the feeling of [the existence of a] rural life is perfectly fixed in the psychology of Brazilian society.”⁶²

Oliveira Viana characterizes the latifundium (or “great rural domain”) as greatly affecting Brazilian society and its national identity. This was one of the main arguments of the author’s political proposal for an authoritarian and centralized political structure in Brazil. Oliveira Viana became famous as an “organic thinker” who opposed the liberals that would promote a “naive legalism”, or “constitutional fetishism”. First, we can see that Oliveira Viana

60 “In this environment of forests and fields, this new society, yet only in its formation, is – and will be for a long time to come – a society with a fundamentally rural structure, based entirely on an exclusive base of agricultural estates (latifundia). Therefore, a society of habits and customs [that are] characteristically rural.” And he continues: “Hence, this very interesting conflict, which we have seen throughout the colonial period, between the peninsular spirit and the new environment, that is, between the old European tendency, of a visibly centripetal character, and the new American tendency, of a visibly centrifugal character: the former attracting the upper classes of the colony to the cities and their charms, the latter impelling these same classes to the countryside and their rude isolation”, VIANA (1973) 33.

61 VIANA (1973) 52.

62 VIANA (1973) 39.

considered the latifundia as the central element in Brazil, so that, accordingly, a Brazilian sociology should be a rural sociology. He even stated that, in Brazil, “we are the latifundium”. Its centrality is such that he affirmed that the process of ruralisation, carried out by the “great agricultural domination” of the latifundium, would be the “centre of the polarization of all the social classes of the country”, and that “its entry into the scenario of high national politics is the greatest event of the fourth century”.⁶³ This occurred because this form of property crushed and swallowed the smaller properties, and made the appearance and maintenance of the latter unviable.

The central element of this analysis is the “simplifying” (and disruptive) function that the self-sufficient latifundia generated in the country’s social organization. Oliveira Viana points out that, being “dispersed and isolated in their disproportionate territorial enormity, the lands are forced to live by themselves, with themselves and for themselves”. Thus, from its need for self-subsistence, the “great dominion, as seen from its past constitution, is a complete organism, perfectly equipped for an autonomous and proper life”.⁶⁴ In this way, the functioning of the latifundium could be compared to that of a fiefdom. The latifundium is understood as a small world; it is self-sufficient. It produces almost everything it needs, reducing trade and communications, and generating a “simplifying function that ‘decentralized’ the Brazilian people, making a national identity unviable”.⁶⁵

This “simplifying function”, however, would not be the only obstacle to the main objective of the period (post-independence): the creation of national unity (and, one might dare say, of the Brazilian nation itself). Two additional key factors would be the inexistence of “elements of solidarity” together with the absence of development of a middle class, or “people”, and the local power of the rural aristocracy (centripetal caudillismo). The power of the rural aristocracy is emphasized as one of the greatest obstacles to the formation of State power in Brazil. The landlords (*senhores de engenho*) had real power, which violated “even the determinations of the metropolis”. Such fundamentally local power⁶⁶ did not allow for the development of central-

63 VIANA (1973) 49.

64 VIANA (1973) 121–123.

65 VIANA (1973) 124 f.

66 “What, then, is the basis of this prestige, of this ascendancy, of this undeniable power? The prestige, the ascendancy, the power of the São Paulo nobility are of purely national origin and have an entirely local basis. It is on the *sesmaria*, on the rural domain, on the agricul-

ized and national State power. This was so, as Oliveira Viana argues, because in “vast areas [made up] of agricultural estates, only the great rural landlords exist. Outside of them, everything is rudimentary, shapeless, fragmentary. They are the great domains as if they were solar foci: villages, industries, commerce – everything is overshadowed by their powerful clarity.”⁶⁷

In turn, the same process of ruralisation would prevent smaller properties from developing and, with them, the emergence of a bourgeoisie and a middle class, i.e. this “simplification of the structure of rural society is accentuated by one of the most serious failures of our collective organization: *the inexistence of a middle class, in the European sense of the expression*. It is mainly in the smaller, flourishing and progressive rural estates that this class has its best base.”⁶⁸

The latifundium, which, at first, generated accommodation, conformism and ruralisation in its ‘simplifying function’, could not form “a society or something similar to it” in Brazil. What resulted from this was the creation of a society “without complete social frameworks; without differentiated social classes; without organized social hierarchy; without middle class, without industrial class; without urban classes in general. Our rural society is the ruins of a vast and imposing building – in a framework, [which is] incomplete, unusual.” This would have disastrous consequences for national solidarity and for the formation of the Brazilian people. Oliveira Viana envisions a situation that could

“result in the constitution, among us, of a strong, wealthy, independent, prestigious middle class, with the capacity to exercise, in the face of the large landed estates, the admirable role of the Saxon *Yeomen* or the bourgeois [...]. The great dominance [of the latifundium], in creating an environment which is very unfavourable to the vitality and expansion of smaller estates, prevents their emergence from happening at all. Hence, the accuracy of that statement by Luiz Couty, when describing, in [18]82, our society – ‘*Brazil has no people!*’”⁶⁹

tural and pastoral latifundium that they are based.” Oliveira Viana continues: “This society, yet in its formation, dispersed, incoherent [...], really revolves around the rural domain. The rural domain is the centre of gravitation of the colonial world. Within the general spread of the population, it resembles a small solar nucleus with its laws and its organized autonomy. It is from it that the determination of social values begins. It is back to it that the spheres of influence are traced”, VIANA (1973) 66.

67 VIANA (1973) 125.

68 VIANA (1973) 131.

69 VIANA (1973) 135 ff.

In the vision of Brazilian society supported by Oliveira Viana, there would be no space to create institutions, which would, therefore, result in a recurring search for the strongest: the lords of the land, who ended up acting almost like great “clan chiefs”.⁷⁰ In the opposition between caudillismo (“*caudilismo*”) and the Nation, in an “un-constituted” Brazil, the greatest danger of “oppression” would come from the local, divisive segmentary power of the rural aristocracy, and not from the power of the State.

Therefore, we are now close to the political project of Oliveira Viana to found the Brazilian Nation, giving it political *and* social unity. This project could only be carried out “by the slow and continuous action of the State – a sovereign State, uncontested, centralized, unitary, capable of imposing itself on the whole country thanks to the fascinating prestige of a great national mission”.⁷¹ This “mission” of the centralizing State was conceived by Oliveira Viana through the opposition of the Brazilian political problematics to the European ones, i.e. an opposition between the concepts of freedom and authority. Thus, while Europe had achieved its freedom by extirpating the oppressive central power (authority), Brazil, by importing liberal political ideas from Europe, would find itself “afraid” of central authority, even without ever having known it in practice. “Brazil’s problem would be a problem of lack of central authority rather than excess of it.”⁷²

Thus, for the author, the

“comparative study of the new American societies and the old European ones, in their history and structures – in the factors that carry out their formation – shows, with evidence, how deep the intrinsic difference is between the new social type, which is formed in the New World, and the old social type, formed in the European world. The two models are founded on very different bases, each one revealing a specific organization, with its own structure and a psychology that reflects, in all its

70 The “unifying and integrating agents” who acted overseas would, therefore, be totally absent when it comes to Brazil. Thus, “such a lack of the institution of social solidarity results from the fact that, among these multiple agents of social synthesis, whose integrating function is so decisive in the formation of European societies, not even one, throughout our historical evolution, has had an impact on the rural clans in order to force them towards a general movement of concentration and solidarity. On the contrary, since the first century, these clans have maintained their initial insularity. Coming from the regime of the great independent [landed] domains, they have reached our [present] days without having succeeded in elevating their organization above the small human group that forms them”, VIANA (1973) 157.

71 VIANA (1973) 259.

72 VIANA (1973) 286 f.

manifestations, the stamp of these natural singularities. The economic, social and political problems of these new societies demand, for this very reason, in the forms of their equation, the inclusion of absolutely new data, resulting in information that Western thinkers and statesmen could not, and cannot, even presuppose the existence of.”⁷³

For Oliveira Viana, “this is one of the most unique aspects of our social structure. We are entirely different from European societies. Nothing that exists there, at this point, happens here: we are completely *other*.”⁷⁴

Thus, Oliveira Viana wins another argument as he opposes the so-called “institutional fetishism”, because, unlike Europe that feared oppression from above, stemming from the strong State, in Brazil, oppression would come from local power, the strong State being needed to protect the population and found the nation. These are the main reasons why Oliveira Viana considers that the latifundium founded the notion of a society “yet-to-be-constituted” and, therefore, advocates a strong and centralized State. This is also why he was called a supporter of conservative modernization by means of an *instrumental authoritarianism*. His authoritarianism is instrumental, because his ultimate political blueprint – namely, a strong and centralized State that would serve as a guarantor (or, even, a founder/builder) of Brazilian nationality – implied a “temporary” authoritarianism, which would one day be replaced. It was not the State itself that was of superior value (as it can be argued in the case of the totalitarianism that was forming at the time in Europe), but the foundation of a national unity that constituted the pressing matter. Thus, modernization (Brazil’s entry into modernity) should also be achieved through the State, which is why commentators have called him a theorist of “conservative modernization”.

3.2 Sérgio Buarque de Holanda

A central theme in the work of Sérgio Buarque de Holanda comprises the issue of the obstacles that the culture of the “cordial man” places in the way of the constitution of democracy. This was something to be found in the Iberian “roots” of the formation of Brazil. Holanda recognizes this in the “wide social plasticity” of the Portuguese, in their lack of “pride of race”, and

73 VIANA (1973) 285.

74 VIANA (1973) 126.

in their manifest flexibility concerning hierarchies.⁷⁵ According to him, the Iberian culture would foster a predominance of the culture of personalism, which, when introduced in Brazil, would have results that would be harmful to the constitution of democracy, precisely with regard to notions of impartiality and abstract rules. Therefore, Holanda states that, “by bringing from distant countries our ways of coexistence, our institutions, our ideas, and in keeping all this in an environment many times unfavourable and hostile, we are still today *outcasts in our very land*.”⁷⁶

The personalistic *ethos* in the colonization of Brazil would have enticed the “adventurous social type” to come to Brazil. As found in a “nobleman’s ethic”, this social type of the adventurer would be marked by the devaluation of physical work. Thus, “the adventurous type” aims to gain without the need for work, unlike the “worker social type” (who would recognize the obstacles, rather than only the gains). This would have had various consequences for the colonization of Brazil.⁷⁷ According to Jessé Souza, “right from the start, we have the critical direction of the entire book. It will be the institutionalization of the culture of personality that will hinder solidarity, forms of organization and the horizontal ordering of our country: in a land where all are barons, no lasting agreement is possible.”⁷⁸ Thus, we can understand that, according to Sérgio Buarque,

“in societies of such clearly personalistic origins as the Brazilian one, it is understandable that simple person-to-person bonds, which are independent and, even, exclusive of any tendency towards authentic cooperation between individuals, have almost always been the most decisive. Aggregations and personal relationships,

75 Besides being an “ambiguous” country forged between Europe and Africa, marked by a culture of personalism, Holanda argues that, “to this, we must add another facet highly typical of its extraordinary social plasticity: the complete, or practically complete, absence among them of any pride of race. [...] It is largely explained by the fact that the Portuguese are, in part, and already at the time of the discovery of Brazil, a people of mixed race”, HOLANDA (1995) 53.

76 HOLANDA (1995) 31.

77 These consequences can be illustrated through the anecdote by Vincent do Salvador, according to which the Bishop of Tucumã, from the Order of St. Dominic, found himself unable to buy certain food items on the streets or in markets, but could indeed do so only in residential houses: “Indeed, said the Bishop: Things are truly inverted in this land, because the whole of it is not a republic, but each of its houses is one”, HOLANDA (1995) 81.

78 SOUZA (2000) 162.

although sometimes precarious, and, simultaneously, struggles between factions, between families, between regionalisms, made it an incoherent and amorphous whole. The peculiarity of Brazilian life seems to have been, at that time, a singularly energetic accentuation of the affective, the irrational, the passionate, and a stagnation or, rather, a corresponding atrophy of the ordering, disciplining and rationalizing qualities. *That is to say, the exact opposite of what seems to suit a population in the process of organizing itself politically.*⁷⁹

It is in this context that we must understand the notion of the “cordial man” that Holanda was working with. According to this notion, appropriated from Ricardo Couto, the “cordial man” would not be the one who would act with politeness, as one might expect at first sight. Rather, “cordial” is that which is guided by the heart, i.e. by emotion (which can be of love or hatred), rather than by interest. Together with the analysis of the “cordial man”, Holanda works on the idea of *favour* that engenders an absence of public dimension. Clarifying its exact meaning, Sérgio Buarque observes that ‘cordiality’ does not necessarily refer to the characteristics of harmony and goodness. It encompasses feelings that are born from the heart, the intimate, the familiar and the private sphere, and, as such, it also encompasses negative feelings. This cordiality is, thus, a “product of our historical and peculiar formation of the Brazilian [style of] life”.⁸⁰

The “cordial man” makes social life an extension of his intimacy. The family and the domestic environment overlap with the impersonal, public one: “the private entity always precedes the public entity [...]. The result has been the predominance, in all [aspects of] social life, of feelings specific to the domestic sphere, naturally particularistic and anti-political— an invasion of the public by the private, with the family invading the State.”⁸¹ All this would support Holanda’s classic statement that, faced with the predominance of personalism, paternalism and patriarchalism, democracy in Brazil would always have been “a lamentable misunderstanding”.⁸²

79 HOLANDA (1995) 61.

80 HOLANDA (1995) 61–62.

81 HOLANDA (1995) 82.

82 “We brought from strange lands a complex and finished system of precepts, without knowing to what extent they adjust to the conditions of Brazilian life and without considering the changes that such conditions would impose. In fact, the impersonal ideology of democratic liberalism has never become naturalized among us. We only effectively assimilate these principles as far as they coincide with the pure and simple denial of an uncomfortable authority, confirming our instinctive horror of hierarchies and allowing us

Without going into the analysis of the origins of the “cordial man” as a Brazilian cultural trait, what is interesting to note is that, for Holanda, this “cordiality” seems to constitute a great obstacle to establishing public order and, above all, democracy, whose future depends on the elimination of the personalist foundations over which Brazilian social life would have been historically based. In other words, “only through a similar process shall we have finally revoked the old colonial and patriarchal order, with all the moral, social and political consequences that it has brought and continues to bring”.⁸³

Thus, Holanda understands that social relations, in Brazil, would be determined by the logic of person-to-person relationships, in the form of primary relations, valuing the culture of personalism and, by definition, would be contrary to the rational and impersonal dictates of abstract norms of democracy. Thus, according to Souza,⁸⁴ the thesis of the culture of personality makes Brazilian modernization superficial and epidermal – a *façade*. In fact, in Brazil, the personalist culture and the primacy of the “cordial man” ended up creating a situation in which “the public was invaded (dominated) by the private”, that is, in all public instances in which primary relations should not exist (as they should be replaced by impersonal relations). Impersonal relations would be lacking in Brazil, whose public sphere would be altered by the sphere of the private (comprising the individual, the favours and loyalty typical of intimate relations, the logic of affects, and friend / foe distinctions).⁸⁵ Holanda focuses on the primacy of the patriarchal family (in which the principle of “*I love one more than others*” prevails) in the constitu-

to treat the rulers with familiarity. Democracy in Brazil has always been a misunderstanding”, HOLANDA (1995) 160.

83 HOLANDA (1995) 180.

84 SOUZA (2000).

85 “The framework of the family thus becomes so powerful and demanding that its shadow pursues individuals even outside the domestic enclosure. The private entity always precedes the public entity in them. The nostalgia of this compact organization, unique and non-transferable, where preferences based on affective ties prevail, could not fail to leave its mark on our society, our public life, [and] all our activities. Representing, as noted above, the only sector where the principle of authority is undisputed, the colonial family provided the most normal idea of power, respectability, obedience and cohesion among men. The result was that, throughout social life, feelings specific to the domestic sphere, naturally particularistic and antipolitical, prevailed – an invasion of the public by the private, of the State by the family”, HOLANDA (1995) 82.

tion of the Brazilian State. The author then uses the reference of the play, *Antigone*, to defend the opposition between the family and the State, the latter not being understood as a mere extension of *oikos*, i.e. family and domestic life.

What Holanda seems to propose is that we free ourselves from our “Iberian Roots”, alongside our personalist culture and the structure of the patriarchal family, so that we may meet the imperative of a public and democratic space in the national constitution:⁸⁶

“The State is not a widening of the family circle and, even less so, an integration of certain groups, certain particularistic desires, of which the family is the best example. [...] The fundamental indistinction between the two forms is nothing more than romantic damage that had its more enthusiastic supporters in the 19th century. [...] Only through the transgression of the domestic and family order is the State born and does the simple individual become a citizen, a taxpayer, eligible, recruitable and responsible under the laws of the City.”⁸⁷

However, and this is an important point, the author believes that a “molecular revolution”, at a “slow and safe” pace, would be happening since the abolition of slavery, with the fall of the great premises of the patriarchal family, and the substitution of sugar cane by coffee (supposedly, a more “democratic” plant, with the possibility of planting across small properties that would constitute something similar to the *farms*, in the USA). This “molecular revolution” would be the adaptation of European democracy to Brazilian reality. Adopting a position sometimes called “Americanist”, the author goes so far as to affirm that there would *be favourable conditions for the constitution of democracy in our country*, even if it seems that this democracy should undergo an adaptation – into something more properly “ours” than the mechanical transposition of European liberal democracy.⁸⁸

86 The impossibility of distinguishing the public from the private, of creating an impersonal order of legal, rational domination in Brazil, generates a scenario characterized by institutions that do not work, since they are always obstructed in their functioning by interests that are alien to them, since they belong to the rationality of the person. This is clear from the following statement by Holanda: “Constitutions made not to be enforced, laws that exist only to be violated, all for the benefit of individuals and oligarchies, are a common phenomenon throughout the history of South America”, HOLANDA (1995) 182.

87 HOLANDA (1995) 141.

88 HOLANDA (1995) 171.

3.3 Caio Prado Júnior

Even with the polemics surrounding his academic erudition in relation to Marxist theory at the time of the publication of his book, *A Formação do Brasil Contemporâneo*, Caio Prado Júnior exerted great influence and was regarded as an “inaugurator of historical materialism” in the political analysis of Brazil.⁸⁹ Indeed, Prado Júnior made an effort to use elements of the Marxist method in the study of the Brazilian social historical experience. This implied not only to consider the theory as of “universal validity and abstracting it from reality” – as, supposedly, the Brazilian communist parties, supported by the Third International, had done⁹⁰ – but to adapt the theory to the Brazilian reality. Prado Júnior opted for the prevalence of the latter, emphasizing a looser and more essayistic adaptation of Marxist ideas, rather than their theoretical discussion.

Those who analyze the repercussions of his ideas sometimes affirm that he would be a *Latin American* Marxist, whose resonance ended up being a gateway through which the historical experience of Brazil can be approached.⁹¹ Along this line of thought, considering the differences and historical peculiarities of Brazil in relation to Europe, a priori, Marxism could only take place at the level of ideas. For the same reason, Brazil’s (and Latin America’s) own relationship with liberalism should be understood as distinct from that of classical Marxism.

The contribution attributed to this author was that of bringing the Marxist-inspired notion of totality to the centre of Brazilian historical analysis.⁹² From such a standpoint, the author could open the way to understanding how the different elements of the colony could be combined. As a result, Prado Júnior was able to realize an “interpretation of Brazil” that would lead “to that distant past, but that still surrounds us on all sides”.⁹³ He recognizes that, although history is made up of the “muddy entanglement (*‘cipoa’*) of secondary incidents” that may even confuse us, there is a certain ‘sense’ or direction that gives them intelligibility, something that should guide our

89 RICÚPERO (1998) 66.

90 RICÚPERO (2007) 149.

91 RICÚPERO (1998) 67.

92 RICÚPERO (1998) 71 ff.

93 PRADO JÚNIOR (1996) 9.

history.⁹⁴ Then, through this vision of totality, Caio Prado Júnior offers an analysis starting from the perspective of this “sense of the colonization”, and progressively approaching “the unity of the diverse, this dialectical experience that would be shown in the totality that is the colonial life”. Such point of view would differ from e.g. Buarque de Holanda, for it would not be possible, starting from the patrimonial family, or the *ethos* of the adventurer, to perceive how the “sense of the colonization” as a totality was established.⁹⁵

The argument goes that, whereas predecessors analysed the colony through its “internal optics” (e.g. the self-sufficiency of the latifundium; ruralisation; the effects of the “Iberian roots of a personalist culture”; and correlations linked to the balance of antagonisms), Caio Prado Júnior situated Brazil’s colonization in the context of world capitalism in formation.⁹⁶ Thus, with overseas expansion and the demands of mercantilism (“external” factors), there would be two possible types of colonization: the colonies of settlement (as in New England), and the colonies of exploitation (i.e. the Brazilian example). The focus is more on “types of colonization” than on a typology of the “environment” or the colonizer, such as “worker and adventurer” and their respective ethics, as put forward by Holanda. From Caio Prado Júnior’s perspective, the typology of Holanda could not explain how a colony (prosperous and organized) such as Australia could be formed, having been, once, colonized by “bandits and deported persons”. Conversely, the explanation could be found in the analysis of the types of colony (exploitation and settlement). The colonization of exploitation, understood as a “system”,⁹⁷ was deployed in Brazil as an enterprise aimed at the production of goods for export markets, which provided intelligibility to the work done by the Portuguese in the country. In other words,

“from the mercantile objective, or rather, as a function of it, what would become the Brazilian colony would be organized. Different elements would be combined in an original social organization, quite distinct from the European one, which would practically answer to a single objective: to supply primary products to the metropolis.”⁹⁸

94 PRADO JÚNIOR (1996) 13.

95 RICÚPERO (2007) 150.

96 That is why many credit Prado Júnior’s “lineage” of Brazilian social theory (or social thought) as one of the pioneering theories of the “sociology of dependence”.

97 RICÚPERO (1998) 71.

98 RICÚPERO (2007) 140.

Therefore, the colony was subordinated (as a totality) to another social body: the metropolis.

Due to this “directional sense” and this totality of the colonial experience, the colony was organized on the basis of slave labour, production by large units, and the supply of valuable goods to the metropolis – that is, according to the author, the constitution of *the “great exploitation”*: something that would be more important and determining for the characterization of the national identity. Thus, such would be an “outwards-oriented” social organization of large-scale exploitation. The link colony-metropolis, within the emerging worldwide capitalist system, would be centred on an organized form of exploitation, which, in turn, meant for Brazil that its internal market and internal relations were chaotic and disorganized. In fact, the social organization was structured by this precise relationship, the only form of organization being that of the relationship between “masters and slaves”.⁹⁹

Furthermore, Caio Prado Júnior does not recognize the notion that the social forms prevailing in the country would be assimilable to feudalism, or fiefdoms. Moreover, he does not see the great productive unit (the *latifundium*) as self-sufficient, but as determined by the general orientation system of colonization, which demands from it the production of certain goods valued by worldwide capitalism [capitalist world markets]. As for the patriarchal family, even Caio Prado Júnior agrees that it would be “the organic cell of our colonial society”, but its formation should be understood only through an analysis of the totality of the colonial experience: “the Brazilian patriarchal family would be formed from the great exploitation itself”.¹⁰⁰

With this tool of totality, the author tries to tackle a contradiction existing between the “political legal organization and the social economic structure of the country. On the one hand, in order to create the National State, we take as a model what exists in the capitalist centre, which tends to transplant liberal institutions that should be guarantors of citizenship”. On the other hand, the mode of production based on slavery was determined by needs that were alien to the country and imposed upon the local population, fostering a great deal of social exclusion for the majority of Brazil’s population.¹⁰¹

99 NOVAIS (1999) 1112.

100 PRADO JÚNIOR (1996) 286.

101 PRADO JÚNIOR (1996) 286 ff.; RICÚPERO (1998) 73 ff.

4 Final remarks

We have been able to see that, after the proclamation of the Republic, but especially after 1920, the “interpretations of Brazil” took centre stage in the debates. The authors studied here focused their concerns on the issue as to how the State could organize a supposedly amorphous society and turn it into a nation, and how the State could put together a political programme for Brazil. Oliveira Viana advocated the foundation of a strong State, which, through “instrumental authoritarianism”, would found the Brazilian Nation; Caio Prado Júnior thought that a socialist programme for the country could not bypass the analysis of Brazil describing it as a colony; and, finally, Sérgio Buarque de Holanda analyzed the establishment of public rationality and democracy in Brazil. Common to all three analyses (even if they are very different from each other and described with a great deal of oversimplification for our purposes) was the assumption that Brazil presented structural differences in relation to the centre of European modernity of that time, and that these structural differences required a great theoretical effort in order to understand the consequences of these Brazilian peculiarities.

Such interpretations also dealt with the problem as to how certain theoretical references to advanced capitalism would work in the Brazilian context. This is the case, for example, of European liberalism, which, in Brazil, coexisted with slavery.¹⁰² Roberto Schwarz’s evaluation highlights the mismatch existing between liberalism in Europe and liberalism in Brazil:

“We had just achieved independence in the name of French, English, and American liberal ideas, [...] which were thus part of our national identity. On the other hand, with equal fatality, this ideological ensemble would clash with slavery and its defenders, and, what is more, [with the reality of] living with it.”

In a more categorical way, the author affirms that, “throughout its social reproduction, tirelessly, Brazil adopts and restores European ideas, always in an improper way”, ideas that were “subjected to the influence of the place” and which, without losing their pretensions of origin, “gravitated according to a new rule, whose graces, misfortunes, ambiguities and illusions were also

102 See also FAORO (1994) 80: “Throughout history, the Brazilian national State was born from an absolutist tradition with a liberal form to coopt divergent economic interests, such as those of the rural lord and the urban merchant. The anomaly of this liberalism was not so much its coexistence with slavery, but, above all, the tonic of the constitutional system, vested in the State, and not in the individual, in its rights and guarantees.”

singular. To know Brazil was to know of these displacements, experienced and practised by all as a kind of fatality, for which, however, there was no name, because the improper use of names was in its nature.”¹⁰³

One hopes that this presentation should suffice to demonstrate how the notion of Brazilian “singularity” and “diversity” has been relevant to the discussions of the national identity, both within academia and without. The aim here was to present the debate, without advocating any theory, or discussing its merits. Nor was the intention to explain such confluence of political ideas by more contemporary models of the circulation of ideas. The goal has been, merely, to show how the representation of Brazil in its double diversity (i. e. a land on a divergent path within “the West” and with great internal diversity) became (and may still be) a topic relevant to the debates on the country’s national identity.

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The Tower of Babelgium. The Never-ending Belgian Nation-building

1 Introduction

Ribeiro describes the Brazilian national identity from the point of view of a “diverse diversity”. The specific Brazilian context – a land of many races, living together in an ever-expanding country that did not have a political constitutive moment – led to discourses typical for Brazil. This makes it challenging to comment on Ribeiro’s contribution on *National Identity by Diversity – Brazilian Nation Building Ideas and Theories, 1920–1948 (and their Aftermath)*, because Brazil and Belgium are two very different countries, with their own history and identity.

The current Kingdom of Belgium, for its part, did have a decisive political constitutive moment: it was born out of a revolution in 1830, when it separated from the United Kingdom of the Netherlands. Before 1830, the “Belgian territories” were always part of other entities. This did not prevent nationalist historians such as Henri Pirenne (1862–1935) from detecting a “Belgian identity” already in the Middle Ages and before.¹ Generations of Belgians even learned in school that they descended from the “*Belgae*”, mentioned by Julius Caesar in his *De Bello Gallico*.² Despite these efforts to use

1 Henri Pirenne (1862–1935) was a Belgian medievalist of Wallonian descent. Between 1900 and 1932, he published his history of Belgium (*Histoire de Belgique*). On Pirenne, KEYMEULEN (2016).

2 Generations of Belgians had to study his words from Book I, I: “Horum omnium fortissimi sunt Belgae, propterea quod a cultu atque humanitate provinciae longissime absunt, minimeque ad eos mercatores saepe commeant atque ea quae ad effeminandos animos pertinent important, proximique sunt Germanis, qui trans Rhenum incolunt, quibus cum continenter bellum gerunt.” Translated into English: “Of all these, the Belgae are the bravest, because they are farthest from the civilization and refinement of [our] Province, and merchants least frequently resort to them and import those things which tend to effeminate the mind; and they are the nearest to the Germans, who dwell beyond the Rhine, with whom they are continually waging war.” McDEVITTE (1915). Personally, I have never really understood whether I had to take this as a compliment or an insult: my “ancestors” were the bravest of all Gauls, but only because they were the least civilized.

historical examples to create a Belgian national identity, Belgians are famously known for their lack of national pride. The Belgian identity is sometimes labelled as “*belgitude*” – literally “*Belgianness*”.³ It has in common with the Brazilian identity that it can be described as a “hollow” identity. Belgians are Belgians because they are not French, Dutch or German, just as Brazilians are Brazilians because they are different from their neighbors in South America.

There is, however, a more fundamental problem with the Belgian identity. As the Socialist Destrée wrote in 1912 in a letter addressed to the Belgian King: “In Belgium there are Walloons and Flemings. There are no Belgians.”⁴ In order to understand this, I have to explain the specific constituency of this little country. Just like Luxembourg and Switzerland, Belgium lies on the European fault line that separates the Germanic from the Romance-speaking territories. Therefore, I have decided to discuss how Belgium has dealt with its diversity in languages, because it is currently the most important determining factor for the Belgian identity – or the lack thereof. This is my interpretation of the dialogue between legal historians from South America and Europe, as organized by the Max Planck-Institut für Rechtsgeschichte und Rechtslehre: an exchange of views and experiences from our own specific national, legal and historical perspectives.

I will start by analyzing the historical antecedents of Belgium, with emphasis on the French (1795–1814) and Dutch (1815–1830) periods, which culminated in the 1830 Belgian Revolution and the 1831 Constitution. Further, I will study how Belgium has implemented successive legislative and constitutional changes in order to deal with the growing division between its two main language groups, resulting in a unique state structure.

2 Historical antecedents of the language diversity in Belgium

Already in the Middle Ages, most of the territories of the current Kingdom of Belgium had language diversity. Interestingly, the historical state borders never coincided with the language divide. The County of Flanders, the

3 This neologism was first used in 1976 by Pierre Mertens and Claude Javeau in *Nouvelles littéraires*. Since then, it has often been used. JAVEAU (1989).

4 “Il y a en Belgique des Wallons et des Flamands. Il n’y a pas de Belges.” Lettre au roi sur la séparation de la Wallonie et de la Flandre, published in the *Revue de Belgique* on 15 August 1912.

Duchy of Brabant and the Prince-Bishopric of Liège all had a French-speaking population in the South and a Dutch-speaking population in the North of their territory.

Between the 14th and the 16th centuries, the Burgundy⁵ and Habsburg dynasties⁶ united most of the Low Countries.⁷ At the end of the 16th century, the North became independent, as the Republic of the Seven United Netherlands,⁸ while the South remained under Habsburg rule.⁹ This split would have salient consequences for the languages used. In the North, a standard Dutch language developed (“*Nederlands*”).¹⁰ Just as in Germany and England, a decisive element, here, was the translation of the Bible into the local language (the so-called “*Statenbijbel*”). This new standard language was a mixture of the local Dutch dialect (“*Hollands*”) with the dialects (“*Brabants*” and “*Vlaams*”) of the many Protestant refugees who had fled the South at the end of the 16th century.

In the South, a different picture emerged. In the Dutch-speaking parts, the majority of the population continued to speak their local dialects, while the upper class increasingly began to speak French. Since the Middle Ages already, this had been the language of the nobility, and, especially in the 18th century, the upcoming bourgeoisie started to adopt this language. This interesting sociological phenomenon can be explained by the fact that the local dialects did not have the same status as French, which was the *lingua franca* of its time – it was the language of diplomacy, science, literature, culture, philosophy, etc.

In 1795, the French revolutionary armies conquered the Southern Netherlands and annexed these territories to France.¹¹ As they had done in France itself, they made *tabula rasa* of the *Ancien Régime*. They set up, for instance, new judicial and administrative institutions, introduced new legislation

5 BOONE (2015); VAN LOO (2018).

6 CURTIS (2013).

7 The Prince-Bishopric of Liège, for example, would remain independent until the French conquest in 1795 and the subsequent annexation by France.

8 Spain officially recognized the Republic of The Netherlands with the 1648 Treaty of Münster. For more on this Treaty, MANZANO BAENA (2013); on the Dutch Republic, ISRAEL (1995).

9 In the 16th and 17th centuries, the Spanish Habsburgs and, after the 1713 Treaty of Utrecht, the Austrian Habsburgs.

10 For a short history of the Dutch language (*Nederlands*), VAN DER HORST (1997).

11 BERGER et al. (2015); ROEGIERS/VAN SAS (2006).

(with the Napoleonic law codes between 1804 and 1810), and drew up new judicial and administrative boundaries (the *départements* and *cantons*). Unsurprisingly, this increased the importance of French in public life, also in the Dutch-speaking areas.

After the defeat of Napoleon Bonaparte in 1813/1815, the newly formed Kingdom of the Netherlands reunited the two parts of the historical Low Countries. Centuries of separation and divergent evolution, however, had left their marks. The marriage was uneasy, to say the least, since the two parts of the Kingdom were very different.¹²

The North had experienced centuries of independence, fighting off its many enemies on land and at sea. During its so-called Golden Age, its economy boomed, and art flourished. Dutch ships ruled the waves. They established a global trade network and brought home spices and other riches from all over the world. The Dutch were mainly Calvinist, which translated into a sober, hard-working way of life. As already stated, Dutch (*Nederlands*) had developed as the national language, with a rich literature, also in the scientific, legal and administrative fields.

The South was almost the opposite. For centuries, it had been a subjected territory within larger entities: the Spanish Habsburg Empire, the Austrian Habsburg Empire, and last, but certainly not least, the French Empire. Its population was mostly active in agriculture and (proto-) industrial activities. The Counter-Reformation had re-established Catholicism as the dominant religion, omnipresent in all aspects of public and private life. Finally, French had become deeply rooted, not only in the Southern parts, which were historically French-speaking, but also in the Dutch-speaking North.

King Willem I, who ruled the country as an autocratic leader, made it even worse. Especially his politics regarding education, religion and language met massive resistance in the Southern part of his Kingdom.¹³ For instance, the King imposed Dutch as the only official language in the Dutch-speaking territories, which frustrated the French-speaking upper class there. Many young, French-speaking lawyers, who were also active as journalists, were prosecuted and sent to prison for their inflammatory publications.¹⁴

12 MARTEEL (2018).

13 For a recent overview of the literature on the language politics of King Willem I and King Leopold I (the first Belgian King), DENECKERE (2015).

14 DELBECKE (2013).

The tensions culminated in 1830, when revolt broke out. The Belgian Revolution was successful, and consequently, in 1831, the national Congress promulgated the Belgian Constitution.¹⁵ In many respects, this Constitution was a reaction against the autocratic policies of King Willem I. For instance, since many revolutionaries had experienced repression for their political ideas, it included the principle of the freedom of the press. The Constitution protected many other freedoms, turning it into the most liberal constitution of its time. One of these freedoms was the freedom of language. Article 23 of the Constitution stated: “The use of languages spoken in Belgium is discretionary; only the law can rule on this matter, and only for acts carried out by the public authorities and in judicial affairs.”¹⁶

3 Linguistic diversity in the kingdom of Belgium (1831–1970): French dominance and the Flemish movement¹⁷

The constitutionally guaranteed “freedom of language” resulted in French taking over as the single dominant language. Since only the wealthiest could vote, the French-speaking upper class populated the parliament. Furthermore, French-speaking citizens staffed all the other Belgian higher institutions: the government, the judiciary, the central administration, higher education, the Church’s senior administration, the army’s senior staff, etc.

Unfortunately, the majority of the Belgian population did not speak French, but only some local dialect. In the South, where the population spoke French (Walloon) dialects, the step to standard French was not that big. In the North, however, the majority of the population just continued to speak their local dialects (i. e., the West-Flemish, East-Flemish, Brabantian and Limburg dialects). As a reaction against French dominance, the so-called “*Flemish Movement*” (“*Vlaamse Beweging*”) arose.¹⁸ This was a romantic, cul-

15 On the Belgian Constitution, POPULIER/LEMMENS (2015).

16 “L’emploi des langues usitées en Belgique est facultatif; il ne peut être réglé que par la loi, et seulement pour les actes de l’autorité publique et pour les affaires judiciaires.” BIVORT (1858) xxii. This principle has not been altered; it is now, after the renumbering of the articles in 1994, in Article 30 of the Constitution. For the English text of the current Constitution, https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/Grondwet_UK.pdf (consulted on 28 May 2019).

17 VAN GINDERACHTER (2001); for a general overview of Belgian political history, WITTE et al. (2009); for the Belgian Constitution, DESCHOUWER (2005) and DELMARTINO et al. (2010).

18 For an overview of the historiography of this movement, DE WEVER (2013).

tural movement, fighting for the rights of the Dutch-speaking population of Belgium. The diversity in dialects soon proved to be a considerable obstacle. There was no standard writing style, only some archaic writing styles from the past. The local dialects also heavily influenced the spoken language. Therefore, when Karel Lodewijk Ledeganck, the Justice of the Peace of Zomergem, wanted to write a translation of the Code Civil, he was confronted with huge problems. Many French words did not have a Flemish equivalent while many old Dutch words were obsolete, etc. Still, when he managed to publish his translation, it proved an instant success, illustrating the need for this kind of publication.

Within the Flemish Movement, there was initially no unanimity. Some wanted to preserve the local dialects. One example is the priest-poet Guido Gezelle (1830–1899),¹⁹ who wanted to turn his West-Flemish dialect into an autonomous language.²⁰ The majority, however, with Jan-Frans Willems as leader,²¹ believed that it was smarter to adopt the already existing standard language of The Netherlands, as this was the only way to gain enough strength to fight French dominance. Eventually, the latter happened. From 1849 onwards, there were Dutch-language conferences, with representatives from Belgium and The Netherlands.²²

What followed was an intensifying power struggle between the Flemish Movement and the French-speaking elite in Belgium. In the 1870s, the Flemish Movement achieved its first successes, with the voting of several Language Acts. In 1873, the First Language Act introduced Dutch as an official language in criminal affairs in Flanders, as the Dutch-speaking North of Belgium is called nowadays.²³ In 1878, the Second Language Act stipulated that public-sector administrations had to address the Flemish population in Dutch (or offer bilingual communications in Dutch and French).²⁴

19 <https://www.britannica.com/biography/Guido-Gezelle> (consulted on 31 May 2019).

20 It may sound like a strange idea, but this is what actually happened in Norway, with Nynorsk as the language based on the dialect of the Bergen region.

21 <https://www.britannica.com/biography/Jan-Frans-Willems> (consulted on 31 May 2019).

22 One of the results of this collaboration was a dictionary of the Dutch language: this project started in 1864, only to be finished in 1998. The result reached 40 volumes containing half a million words in total, turning it into the biggest dictionary in the world. http://neon.niederlandistik.fu-berlin.de/nl/nedling/taalgeschiedenis/woordenboeken_van_de_19e_en_20e_eeuw/ (consulted on 24 May 2019).

23 Act of 17 August 1878, *Moniteur belge*, 26 August 1873.

24 Act of 22 May 1878, *Moniteur belge*, 25 May 1878.

In 1883, the Third Language Act introduced new regulations for high schools in Flanders: until then, these had been unilingual French, but, from then on, language courses had to be taught in Dutch, while science courses had to be bilingual.²⁵ In 1898, the Flemish Movement won its greatest victory of the 19th century with the so-called “Equality Act” (“*Gelijkheids-wet*”),²⁶ which formally declared Dutch an official language in Belgium, equal to French.²⁷

Although the Flemish Movement had acquired some success, its supporters still had many more demands: university education in Dutch, unilingual Dutch justice system and administration in Flanders, administrative autonomy, more Flemish officers in the army, etc.

In 1914, the Germans conquered most of Belgium, only to be stopped at the River Yser in the far West of the Belgian territory. In the occupied territories, the Germans applied the old adage, “*Divide et Impera*”. In 1916, for instance, German Governor-general Moritz von Bissing transformed Ghent University into a Dutch-speaking university.²⁸ Nevertheless, the Germans could only seduce very few, radicalized Flemish nationalists, while the vast majority remained loyal to the Belgian cause.

After the First World War, the voting system was reformed according to the principle, “one man, one vote”, which gave the Flemings an even bigger majority in parliament. At that time, however, the ideological differences between Catholics, Liberals and Socialists were more prominent than the ones between Dutch- and French-speakers, which explains the reason why the Flemings did not use their numeric majority to push through further reforms. Besides, one should not underestimate the power of the “establishment”, which was still majority French-speaking and preferred the status quo.

Nevertheless, the French-speaking population, especially in Wallonia (as the South of Belgium is called), felt threatened for another reason: in the previous decades, many Flemings had migrated to the South of the country to seek work in heavy industry (coalmines and steel mills) and agriculture, creating huge Flemish migrant communities within Wallonia. This way,

25 Act of 15 June 1883, *Moniteur belge*, 25 June 1883.

26 Act of 18 April 1898, *Moniteur belge*, 15 May 1898.

27 This 1898 Act was a direct consequence of the 1893 voting reform, when every man aged 25 and older received at least one vote.

28 TOLLEBEEK (2010).

Belgium was slowly evolving into a bilingual country, with both languages being spoken across the whole territory.

Alarmed by this evolution, the French-speaking population in Wallonia insisted on the implementation of the so-called “territoriality principle” in their part of the country. This specified that only the dominant language of a region could be used as an official language in that region. The Walloons got what they wanted with the Act of 31 July 1921 “on the use of language in administrative affairs”, which defined language areas according to the language of the majority of the local population.²⁹ In Wallonia, this was French; in Flanders, Dutch; and, finally, in Brussels, both. The Flemings were also in favour of the 1921 Act, since it strengthened the position of Dutch in Flanders, to the detriment of French.

This law had far-reaching implications because, in the following years, more and more aspects of public life were affected. In 1930, for example, Ghent University became the first homogeneous Dutch-speaking university in Belgium. In 1935, the Act on “the use of languages in judicial affairs” determined what language should be used in courts of law: only Dutch in Flanders, only French in Wallonia, and both in Brussels.³⁰

In other words, the struggle for Dutch as an official language in Flanders, combined with the preference of the French-speaking population for the territoriality principle to keep Wallonia unilingual, resulted in an exclusive monopoly of Dutch in Flanders. This meant that the historical French-speaking minority in Flanders became officially marginalized. Its members could, of course, continue to use their mother tongue in the private sphere, but had lost their ability to do so in public life. In itself, this was not that big a problem, since most of the French-speaking Flemings were already bilingual. The other way round, Dutch-speaking immigrants in Wallonia also had to assimilate, which was also no problem, since they were doing this by themselves already.

One specific problem was that the boundaries of the language areas were not officially determined in 1921. The legislator intervened in 1932 and stipulated that the population would have to be counted every ten years

29 Act of 31 July 1921 “op het gebruik der talen in bestuurszaken”, *Moniteur belge*, 12 August 1921.

30 Act of 15 June 1935 “op het gebruik der talen in gerechtszaken”, *Moniteur belge*, 22 June 1935.

in order to determine the language regime.³¹ The Flemings, however, found this hard to accept. With every census, they were losing some territory. The reason was simple: French-speaking Belgians who went to live in Dutch-speaking villages did not adapt. They continued to speak French until they became the majority through immigration, and the language regime of the village changed. The same did not apply when Flemish-speakers went to live in majority French-speaking villages: they tended to adapt and to start speaking French. This way, the language boundaries moved only in one direction, with Flemish-speakers always on the losing side.

In 1962, the language areas were definitively determined, with a Dutch-language area, a French-language area, a German-language area (for the German-speaking territories that Belgium had acquired after the First World War) and, finally, a bilingual Dutch-French language area centred on Brussels. A number of villages with large minorities received so-called “facilities”.

4 Constitutional reforms from 1970 to the present

All the changes above were simple legislative changes, without affecting the Constitution. In fact, from the outside, Belgium looked in 1970 quite the same as it had in 1830. It was still a unitary state, with a strong central government in Brussels. All the institutions and ministries were national. Political parties were also nationally organized, except for the Flemish nationalist party, “*Volksunie*”.

Under the surface, however, the centrifugal forces had been building up strongly. On all major postwar issues, Flemish-speakers and French-speakers had different views.³² Both major language groups also had their own spe-

31 A similar system, with fluctuating language areas, is still in force in Finland, which has, historically, a Swedish-speaking minority. HALONEN (2014) 61 and further.

32 Immediately after the Second World War, there was, for instance, disagreement regarding the return of King Leopold III as Belgian King. This led to the 1950 Referendum, with Flemings predominantly saying “yes” and Walloons predominantly saying “no”. The population of Brussels was undecided. The problem was solved by the abdication of King Leopold III in favour of his son, Boudewijn/Baudouin. Another example is the 1960 Economic Expansion Act, which was heavily contested by the trade unions in the South of the country. A final example is the University of Leuven: in the 1960s, this university was still bilingual, but the Flemish Movement wanted to turn it into a Dutch-speaking university, since it was situated in Flanders. French-speakers resisted. In 1968, the latter lost the battle. The University of Leuven was turned into a Dutch-speaking university,

cific reasons for wanting to reform the state. The Flemings wanted more cultural autonomy, which they saw as the next step in their historical emancipation process. The French-speaking community had different considerations. The South of the country had major economic difficulties, due to the decline of the traditional heavy industry (coalmines and steel mills). French-speaking Belgians felt they needed more autonomy in economic matters to be able to deal with their specific problems. They also wanted guarantees to protect their minority position in numeric terms within the Belgian Kingdom.

In 1970, the reform of the state started. It was the beginning of an unstoppable and ongoing process, which generated and reinforced its own dynamics, with successive reforms in 1980, 1988, 1993, 2001 and 2011. The result is an incredibly complex institutional framework, with three communities (Flemish, French and German), three regions (Flemish, Brussels-Capital and Walloon), and the dismantled but still strong national level, each with their own competences, parliament, government and administrations. Interestingly, all these entities are equal, without any hierarchy between them. Conflicts of competence are solved by a newly created constitutional court.³³ The Constitution also contains many guarantees for the protection of minorities (the French-speaking minority in Belgium, the Dutch-speaking minority in Brussels, the German-speaking minority in Wallonia, etc.).

In the slipstream of the constitutional reforms, the separation between the two main language groups has been growing ever stronger. In the 1970s, the three main Belgian political parties all split into separate Flemish- and French-speaking political parties: both the Christian Democrats and the Liberals in 1972, and the Socialists in 1978. Many other entities would follow suit. The National Bar Association, for example, was dissolved in 2001, since Flemish lawyers had founded their own breakaway Flemish association.

Since then, Belgium has increasingly become a divided country. In the North, there are the Flemings, with their own language (Flemish, a variation on Dutch), mentality, culture, media, political context (in their majority,

French-speakers founded a new, French-speaking university, some 30 kilometres to the South, called Louvain-la-neuve.

33 On the Constitutional Court: <http://www.const-court.be/public/brbr/e/brbr-2014-001e.pdf> (last accessed on 1 June 2019). ALEN (1992).

voting for right-wing parties) and economic situation (prosperous, with a low unemployment rate), etc. In the South, there are the Walloons, also with their own language (French), mentality, culture, media, political context (mirroring the Flemings' but, in their majority, voting for left-wing parties) and economic situation (bad, with a high unemployment rate), etc. The Flemings tend to look to the English-speaking world, while French-speakers gravitate towards France. Both language groups are living next to each other, with very few things in common.

To make things even more complex, there are two exceptions in this general picture: Brussels and the German-speaking part of Belgium. They deserve some further explanation.

Brussels was historically seen as a Dutch-speaking city, but, in the 19th and 20th centuries, it became rapidly majority French-speaking due to the sociological process of francization, as explained above.³⁴ Therefore, Brussels has always been a point of friction between Flemish- and French-speaking Belgians. The Flemings consider it a Flemish city, with the (remaining) Dutch-speaking population being part of the Flemish community. French-speakers, on the other hand, consider it primarily a separate region, which they can dominate thanks to their numeric majority. This way, Brussels seems to be little Belgium, but in reverse, with a majority French-speaking community and a minority Dutch-speaking population. In fact, in the past decennia, reality has been changing again, due to the massive influx of immigrants, both poor (due to economic migration) and rich (linked to Europeanisation), turning Brussels into a truly international city.

The German-speaking part of Belgium has another, specific history. After the First World War, with the Treaty of Versailles, Belgium received some small territories in compensation for the damages caused by the War: Eupen-Malmédy and Moresnet. The language situation, here, is again complicated, with German-speaking districts and French-speaking ones. In the wake of the titanic struggle between Flemish-speakers and French-speakers, German-speaking Belgians acquired their own German-speaking community and a certain autonomy. In general, however, this language group has no impact on Belgian politics, due to the small number of German-speakers.

34 WITTE et al. (2009).

5 Some concluding reflections

Language diversity has always been a characteristic of the “Belgian territories”. The way the authorities have dealt with this diversity, is a fascinating and complex story, with various factors at play. There is, for instance, the sociological dimension, with French being seen as the superior language of culture, which, for centuries, was attractive to the upper layer of society (nobility and gentry). It created a French-speaking minority within Flanders – and even an enduring French-speaking majority in the biggest city of Flanders, Brussels. In reaction to the French-speakers’ dominance, the Dutch-speaking majority in Belgium started emancipating itself and fighting for its rights. In the process, the Flemings abandoned their local dialects and embraced the standard language of The Netherlands, creating one official common language, Dutch (“*Nederlands*”).

Broader geopolitical evolutions have heavily influenced the history of language politics in the Belgian territories. The French conquest of the Belgian territories was decisive. Just as in the rest of France, the French revolutionaries had no respect for local languages and tried to suppress them as much as possible. In the following Dutch period, King Willem I tried to reverse this by imposing Dutch as the only standard language, but he encountered heavy resistance from the French-speaking bourgeoisie. With the Belgian revolution, French was able to regain its status as the dominant language in the Belgian territories. Interestingly, this was not attained by imposing French as the official language in Belgium, but by embedding the “freedom of language” principle in the Belgian Constitution. The strength of the language, combined with the power of its dominant, wealthy upper-class speakers, did the rest.

One interesting angle relates to the influence of this language diversity on Belgian legal culture.³⁵ As explained above, Belgian legal culture is French in origin. The French simply erased the existing legal culture and replaced it with their own. When the Dutch took over, there were plans to introduce new Dutch codes of law, but the Belgian revolution made these plans obsolete. Instead, the young Belgian state continued to use Napoleonic legislation and institutions. For a long time, French remained the only legal language in use, allowing Belgian lawyers to inspire themselves thoroughly

35 DEBAENST (2020); HEIRBAUT (2017); HEIRBAUT/STORME (2006).

from France's more significant legal culture. The gradual introduction of Dutch as an official language did not change this, since most Flemish lawyers knew French perfectly well. It was only after the Second World War that a mature Dutch-speaking legal culture started to appear. Although the judiciary, until today, remains a national competence, there are indications that separate Flemish- and French-speaking legal cultures are developing, although one should not exaggerate this phenomenon.

With the successive reforms of the state, the Belgians have constructed their own, unique "*Tower of Babelgium*". According to the etiology of the Tower of Babel, God created multiple languages to punish humans for having committed blasphemy by building this tower.³⁶ This way, He divided humanity by language, so that people could no longer understand each other. In Belgium, the same seems to have happened, albeit through a rather dialectic process: because the two language groups no longer understood each other, they decided to reform the state. This resulted in a complex state structure, with separate territories and institutions for all the various language groups, creating a situation in which they understand each other even less.

Belgian politicians will not receive a beauty award for their "*Tower of Babelgium*": it is, after all, the result of numerous compromises and, therefore, very complex and often inefficient. However, they did manage to channel the tensions within the country and to keep the whole transition process peaceful, despite the historical animosities that exist between the two main language groups.

In conclusion, Brazil and Belgium have a "diverse diversity", to use the words of Ribeiro. As I hope to have illustrated above, in the case of Belgium, language diversity seems to be the most important determining factor of diversity.

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36 Genesis 11:1–9.

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The “cuestión foral”: Legal Diversity and Nation-building in Spain*

1 Introduction

The expression *Sonderweg* is used to refer to a particular or exceptional way. In the case of our topic, *Sonderweg* would refer to the particularities of nation- and state-building processes in Europe and in America. If, however, we admit the existence of *Sonderwege*, we must then allow for the existence of a ‘normal’ *Weg* or normal state- and nation-building process consisting in an unproblematic process of homogenization of culture and society. Something similar happens with the term “Modernization”. There would be a normal way to modernity and exceptional ones or *Sonderwege*. The normality would be represented by Western Europe and specifically by France, and the exceptionality would be in the European periphery and in Latin America. The normal cases would be considered as the successful ones, and the cases not following the same pattern would be failed models.

This approach to nation- and state-building and modernization processes is at the core of traditional legal and political history. They were the result of the observation first-degree observers projected: intellectuals in America or in Europe imagined homogenous communities as a reality or as a goal and compared the local experiences they observed with that ideal. The goal was to create homogenous societies. Diversity was considered an obstacle to modernization which, in the case of young American nations, was equivalent to ‘Europeanization’. The different processes of modernization and state- and nation-building were explained as having been caused by the “tradition”, culture and mentality of the Southern European societies.¹

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1 LUHMANN (1995).

Today, neither this projection of nations as homogenous communities nor the idea of a centre producing ‘normal’ legal and political models being received or transplanted in the periphery is sustainable any longer.² If we adopt the perspective of second-degree observers, we shall easily understand that all ways to modernity are *Sonderwege*, that there are no ‘normal’ models of state- and nation-building, that these are actually projections of first-degree observers. This is applicable to countries of the so-called periphery such as Brazil and Spain but also to the countries traditionally presented as central or normal: diversity is not exclusive to the periphery. Even the French nation- and state- building process involved dealing with cultural, linguistic and social diversity.³

If we study processes of nation- and state-building, we must examine processes of legal change and transformation, and this leads us to analyze the contrast between modernity and modernization and tradition. Today, however, these two concepts are not understood as opposed to each other. Tradition can be seen as an obstacle to modernization and also as a path towards it.⁴ Western societies are thus traditional societies that have experienced an evolution of their living traditions.

In the following pages, I explain how tradition was a tool for the legal modernization and unification in Spain in the 19th and 20th centuries. The Civil Code of 1888 did not unify territorially the civil laws in Spain: traditional regional laws (*derechos forales*), survived the codification and remained the valid civil law in regions such as Catalonia, Aragon, Navarre and others. According to tradition, this is proof of the failure of Spanish codification. However, if we overcome this old way of interpreting legal change, very much influenced by the prestige of the French model, we can conclude that the Spanish codification process was not a *Sonderweg*, but rather a particular model adapted to the circumstances of the Spanish nation- and state-building process in the 19th and 20th centuries.

I start from two basic assumptions. First, in the Spanish nation- and state-building process private law and specifically civil law played a very important role. The State, in fact, “charged the codes with the task of creating a partic-

2 GLENN (2014) 33 ff.; DUVE (2014) 37.

3 ROSANVALLON (1990) 100 ff.

4 GLENN (2014) 2; DUVE (2018).

ular way of community life”.⁵ By regulating heritage, marriage and property rights, the codes were creating the nation. The tensions between modernity and tradition and between homogeneity and diversity are also to be observed in the private law codification process. Second, in the latter half of the 19th century, different regional élites used Catalan legal tradition and historical law still in force to project a different model of social and political modernization prioritizing the protection of property and the traditional family. I shall focus on the Catalan case because of the demographic and economic weight of this region and because of the special incidence of Catalan regionalism and nationalism in the Spanish nation- and state-building process.

2 Nation-building and private law unification

Spain was a uniform country from a religious perspective long before the liberal revolution. However, Spain was and is a diverse country socially, linguistically and also from the point of view of legal traditions. The Bourbonic reforms of the 18th century eliminated the Aragonese, Catalan and Valencian institutions, but King Philip V accepted the continuation of Catalan, Aragonese, Galician, Navarrese, Basque and Balearic law. Catalan elites strongly defended Catalan historical law as an instrument of corporatist social organization. The elites did not, however, defend the local languages spoken by the majority of the population. They preferred the Castilian language even if they rejected the imposition of Castilian law.

According to Spanish historiography, the war against the Napoleonic forces and the Constitution of 1812 are the starting moment of the Spanish nation-building process. The Spanish elites imagined the nation⁶ using both local traditions and also ideas imported from France – and rolled out here.⁷ Representatives of Catalonia and the Basque Country participated in the Cortes de Cádiz and voted for the Constitution and for other legal measures aimed at modernizing the country.

In the first half of the 19th century, the Spanish urban élites defended a liberal project for Spain, including economic and legal unification and modernization. The Catalan elites were especially participative in this project and

5 PETIT (2011) 3.

6 ANDERSON (2016).

7 ÁLVAREZ JUNCO (2002).

were more conscious of their national identity than others. In this incipient nation-building process, references to regional history played a very important role. The Catalan Spanish-Nationalists cultivated a romanticized reconstruction of the Catalan past. To praise the *Glòries Catalanes* was their way of building and praising the greater *Nación Española*. As Joan Lluís Marfany wrote a few years ago, the provincialist antiquarianism was an important element of Spanish nationalism in Catalonia and in other Spanish regions.⁸ The Spanish nation had to be built on the foundation of local and regional traditions, existing or invented.

From a legal perspective, these Catalan elites supported the elimination of some Catalan medieval legal institutions and the unification of private law. Jurists and politicians praised the old laws of Aragon and Catalonia and presented them as precedents of modern Spanish laws recognizing personal and political freedom.⁹ The idealization of the middle Ages and medieval law was a great contribution from Catalonia to the creation of a new Spanish national history, which was fundamental to the nation-building process.

There was no demand for a Catalan codification, but rather for a Spanish civil code. As one of the founders of Catalan nationalism acknowledged in 1906, the unification of Spanish law took place during this first half of the 19th century without “awakening protests”.¹⁰ Civil law unification was a key element of this modernization and state-building process. As Pablo Salvador Coderch stated years ago, the élites in Barcelona were favourable to the elimination of important parts of traditional Catalan law.¹¹

The unification of private law was not questioned. However, the historical base of codification created controversy. Using the words of Patrick H. Glenn, we can say that codification was the production of State law via ‘decantation’ of prior historical law.¹² The Catalan elites advocated for a civil code resulting from the decantation of all existing regional historical laws: Castilian but also Catalan, Aragonese, Navarrese etc.

The regional elites, especially the Catalan landowners and industrialists, did not demand to use nor did they angle for the protection of regional

8 MARFANY (2017) 260 ff.

9 MARFANY (2017) 417–463.

10 PRAT DE LA RIBA (1906) 24.

11 SALVADOR CODERCH (1985) 76.

12 GLENN (2003) 78.

languages. Concerns on that issue arose in the last decades of the 19th century. Furthermore, they did not demand political autonomy for Catalonia, Navarre or Galicia. They were committed to the construction of a unified country with one language and one central authority. They did, however, demand the conservation of a number of traditional legal institutions that were key for the maintenance of their conservative, elitist social model. In Catalonia, the elites defended customary law, the emphyteusis, old agrarian contracts such as the *rabassa morta* and the legal capacity of widows. These institutions were the foundations of the two pillars of Catalan traditional society: private property (*patrimonio*) and the traditional family.¹³

According to Catalan jurists and politicians, the specific character of Catalans, the particularities of the Catalan economy and landscape were based on the historical law of the region. Eliminating these institutions would mean the destruction of the specificity of the Catalan economy and society. As Manuel Duran y Bas,¹⁴ representative of the Catalan Legal School, expressed in a famous law book of 1883:

“The Catalans are moderate and staid; they replenish their strength with a modest fare and return happily to work; drunkenness is rare, a dim view of, this vice being taken in town and country alike; progeny abound round dinner tables, and, in terms of criminality, Catalonia ranks on the low end of the scale.”¹⁵

If, in Brazil, the ‘cordial man’ was praised as a model, in Catalonia, the model was the sober, hard-working Catalan presented by Catalan conservative regionalism in contrast to other Spanish populations. The explanation for this regional character was, according to jurists and politicians, the permanence of Catalan traditional law. Regional diversity in Spain was explained with arguments from both general and legal history.

This explains why the first serious attempt to unify civil law, the *proyecto García Goyena* of 1851, failed. The Spanish government presented a civil code draft which was the result of the decantation only of Castilian law. This famous draft code, according to Salvador Codérch, was a clumsy way of imposing the liberal model: it

13 GLENN (2003) 45 ff.

14 I use Duran y Bas as in the original although this author’s name is often written following the Catalan form, Duran i Bas.

15 DURAN Y BAS (1883) XCIX.

“was inserted (into liberalism) with incredible hamfistedness. Drawn up with absolutely no regard for the various civil laws in force throughout the Spanish State (those of Castile naturally being the exception), it was not short on gratuitous aggression toward practices entrenched in the affected territories.”¹⁶

The content of the draft code was therefore a threat to the survival of Catalan traditions and institutions.¹⁷ Catalan elites along with those of other *regiones forales* or regions with historical law, rejected the idea of a civil code applicable to the entire country.

Another possible cause for the rejection of this important draft code was presented by Johannes Michael Scholz. According to him, by rejecting the project, the Catalan jurists were defending the field of Catalan legal professions from interference by non Catalan jurists.¹⁸ Defending Catalan tradition meant protecting Catalan Lawyers in terms of their professional market.

3 Regional laws and regional identities as part of Spanish state- and nation-building

After the failure of the 1851 Civil Code project, the Spanish elites assumed that it would be impossible to produce a unified civil code in Spain. The Spanish nation-building project needed the support of the powerful regional elites, especially those of Catalonia and the Basque Country, and the same happened with a key element of this process: the Civil Code.

During the *Restauración* (1874–1930), the Catalan elites supported the conservative modernization program of the two monarchist parties. They also participated in Spanish nationalism, but, at the same time, they elaborated a political discourse praising the region. The Spanish nation-building process coexisted with different region-building processes based on history, a particular regional identity and regional law. This was actually not exclusive to Spain: similar processes were underway at the same time in other European countries.¹⁹

It is also worth noting that discourses on the Catalan past from the first half of the 19th century were reinterpreted and recycled to be used in this

16 SALVADOR CODERCH (1985) 13.

17 SALVADOR CODERCH (1985) 14.

18 SCHOLZ (1986) 282.

19 STORM/AUGUSTEJN (2012) 2.

region-building process.²⁰ Something similar happened with legal historical discourses: they were reinterpreted and used to demand the conservation and protection of Catalan traditional private law.

In Catalonia, the *Escola jurídica catalana*, led by the lawyer, civil law professor and politician Manuel Duran y Bas, defended the modernization of law based on regional tradition. This Catalan School did, however, largely reject the creation of a Catalan parliament with the power to create new laws: it defended a modernization of the old historical law (*derecho histórico* or *dret històric*) led by the elites and executed by ‘savant’ jurists.

Manuel Duran y Bas and his followers made particular use of some of Savigny’s ideas. They presented themselves as followers of the German Historical School, even if they read Savigny from French translations and adaptations. Catalan jurists incorporated more slogans than ideas in their discourses. The expression ‘Volksgeist’ struck a particular chord with jurists and politicians from Catalonia. That said, the legal and philosophical models of Savigny were neither studied nor adapted: Savigny was used to give prestige to the publications and demands of a particular social group. This is why Antonio Serrano called this “Rezeptionsästhetik”.²¹ Bartolomé Clavero considers that the ‘reception’ of the Historical School was an excuse to oppose the codification process and to bolster the conservation of traditional institutions.²²

Whether it was an excuse or a ‘Rezeptionsästhetik’, what is important is the social and political program contained in Duran y Bas’ interpretation of Savigny. Lloredo Alix has studied the particular way of combining some of Savigny’s ideas with concepts from the old *Escolástica* to create a particular Catholic, historicist and, in some cases, organicist way of studying law.²³ This is key to understanding that, by defending Catalan traditionalist institutions, Catalan jurists were actually protecting a social model for Catalonia based on property and the traditional family from the threat represented by the industrialization process. The process of elaboration of regional laws had to be based on history and religion and not on the will of the Catalan people. Catalan jurists also defended the continuation of a ‘natural’ social

20 MARFANY (2017) 584 ff.

21 SERRANO GONZÁLEZ (1997) 51.

22 CLAVERO (1984) 96.

23 LLOREDO ALIX (2014) 256.

order free from the intervention of the State. It was actually the Catalan version of French legal modernism aimed at protecting old social structures from the intervention of the State in the industrial era.²⁴ Regional diversity was used as a discourse to protect social diversity within the regions.

This Catalan traditionalist *foralista* project was not exclusive to Catalan or other regionalist elites. It was perfectly compatible with the conservative elites in Madrid as well. The development of these ideas was parallel to that of corporatist concepts in savant societies such as the *Ateneos* and the *Reales Academias*.²⁵ This explains the relative coincidence of the two political projects represented by central and regional elites and the cooperation in the administration of political power during the *Restauración*.

History played a very important role in the development of *foralismo*, especially in the construction of a medieval past for Catalonia. The past explained and legitimized how Catalonia was special and how there was thus a need to conserve Catalan law. The look into the past was not exclusive to legal discourses. Medieval history and the use of tradition were very influential in Catalan literature, arts and also urban design. The famous *Barri Gòtic* or Gothic Quarter is actually an invention of that time: numerous Gothic elements and buildings were built or restored in the first half of the 20th century, not in the Middle Ages.²⁶

Was this an antimodern national project or a “deficit in the process of modernization”, to use Ribeiro’s words? In my opinion, it was an alternative way to modernity and nation-building, based on tradition and on the actualization of the past, but a process of modernization after all. Legal regionalism or *foralismo* defended the primacy of customary law, the traditional family and the integral transmission of heritage. The *foralistas* are not to blame for the ‘failed’ and late Spanish civil law codification. The literature comparing this codification to the French model created this idea of successful or failed codifications which needs to be overturned.

As Salvador Coderch underlines, the legal institutions defended by the Catalan School had more to do with the corporatist society of the *Ancien Régime* than with the industrial Catalan society of the 20th century.²⁷ This

24 ARAGONESES (2009).

25 SCHOLZ (2005) 149 ff.

26 COCOLA GANT (2014).

27 SALVADOR CODERCH (1985) 177.

does not contradict the idea of modernization: the foralistas, especially the ones represented by the Catalan School, had a corporatist or pre-corporatist project for the modernization of the Spanish State and society.

Let us consider, for instance, the construction of the Gothic Quarter, in tandem with the project of defending Catalan traditional law. This urban planning project enmeshed the need to create broad avenues with a view to attracting tourists and that of recreating Catalan artistic architecture. The result was the famous quarter in the city centre with neo-Gothic buildings and spaces attracting visitors and standing as a symbol of the city. Indeed, as Cocola Gant explains, jurists, such as Manuel Durán y Bas, who led the Catalan School and presented himself as a follower of the German Historical School, also participated in the restoration of Gothic buildings in Catalonia.²⁸

The artificial and imaginative restoration of medieval buildings, the importance of regionalist antiquarist historiography and the demands for the conservation and ‘restoration’ of Catalan historical law ran parallel and expressed a particular project of state-, nation- and region-building. This discourse was successful in the field of civil law. In 1888, the Civil Code was promulgated. It was applicable only in the territories of *derecho común*.

Thus, even after 1888, the actual physical territory where the Civil Code was in force was not completely defined. The regions with a civil law tradition did not have regional civil codes containing the applicable law. In Catalonia and the other *territorios forales*, traditional law, in the form of old books, old customs and old doctrines, was in force. The Spanish Civil Code was applicable in matters of family, heritage and contract laws only in the absence of rules in *derecho foral* and in the subsidiary sources of law recognized therein. The Spanish parliament or Government had no competences in the identification of the applicable law. This task was under the control of the elites: the decantation of legal rules in the different regions was a task to be performed by erudite jurists such as notaries, lawyers and law professors.

This was not the only project of Catalan regionalism. A group of intellectuals, political activists and also artists defended a democratic, federalist or regionalist model for Spain. This project was defeated in 1874, after the

28 COCOLA GANT (2014) 56.

collapse of the First Republic, but reappeared during the *Restauración* (1874–1930). In an article from 1894, the famous jurist, poet and journalist Joan Maragall qualified Catalan law as a “well conserved, embalmed and mummified” corpse and considered its defence by Catalan jurists to be “depressive and ridiculous”.²⁹ Like other representatives of progressive Catalanism, Maragall demanded the creation of a parliament in Catalonia in charge of legislation regarding civil law.³⁰

This federalist or autonomist progressive Catalanism became hegemonic only at the end of the *Restauración*. Catalan republicanism supported the Spanish Second Republic and controlled the autonomous region of Catalonia and its parliament until the victory of Francisco Franco in 1939. The Catalan parliament rejected the legal culture of the Catalan School and started regulating matters of civil law from a democratic perspective.³¹ The Republic was a path to a modern nation-state based on social rights and State interventionism. It was a project of “building modern citizenship” similar to others in Europe and to the one described by Pedro Ribeiro for Brazil, but this project was defeated in 1939 and replaced by a semi-corporatist, traditionalist and totalitarian nationalist project: *Franquismo*.

The Francoist nationalist project was, according to Sebastián Martín, a “restoration of the *Restauración*”.³² Francoism defended a homogenous nation although it allowed for an epidermal recognition of diversity.³³ The old traditional legal cultures contained in the *derechos forales* were functional to this way of managing diversity in Spain. Francoism consolidated the legal and political force of the old Civil Code of 1888.³⁴ At the same time, the dictatorship praised the old traditionalist, Catholic and corporatist ideology contained in regional legal traditionalism. This is one of the reasons why, in 1946, the *Congreso nacional de derecho civil* in Zaragoza concluded with the decision of adding to the Civil Code regional Appendices containing the different regional civil laws. In 1946, the traditional legal cultures protecting traditional social models were more functional to the Francoist

29 MARAGALL (1981) 442.

30 MARAGALL (1981) 441–442.

31 ARAGONESSES (2017a) 280.

32 MARTÍN (2010) 89.

33 CLARET/FUSTER-SOBREPÈRE (2021) 9.

34 PETT (1996).

project than the Civil Code. The dictatorship promoted the promulgation of “compilaciones de derecho civil”.³⁵ The Catalan one was passed by the Francoist *Cortes* in 1960.

4 Conclusions

The recognition of national, cultural and linguistic diversity via political decentralization is an exception in Spanish constitutional legal history. The Spanish case does, however, represent a different model of recognition of diversity: regional private laws. After 1851, central and regional elites agreed on a project of civil law codification protecting the old legal traditions of the ‘regiones forales’. The Civil Code of 1888 did not eliminate this legal diversity which was functional to the traditional social model of the conservative elites of the *Restauración* and also of Francoism. The nation- and state-building project was not a failed one nor a *Sonderweg* but rather a particular process recognizing diversity in private law as a way to protect a modernization process respecting traditional values and models.

It is worth noting that, in the conservative legal culture, the official and legal recognition of civil law diversity was a way of stopping political decentralization and the democratization of the legislative processes. At the same time, the recognition of ‘derecho foral’ was intended to protect traditional social structures and values from the double threat of industrialization and urbanization. The recognition of diversity in the form of cultural folklores and legal traditions was an instrument of a traditionalist, elitist, from top-to-bottom process of modernization and state- and nation-building which explains many elements of Spanish legal and political cultures today.

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Diversity and Nation Building in the Periphery: Some Thoughts from Argentina

When it comes to comparing how tensions between equality and inequality may have affected legal systems in Europe and in Latin America, the first and most obvious impulse would be to think of it in terms of success and failure. As the initial call for the Law and Diversity workshop reminds us, the continental European legal system is “based on the principle of equality” and is now facing increasing demands “to take more account of individual and collective special situations”. How can this be done without obliterating its egalitarian, liberal core? The underlying assumption here is that, at least until now, the system has been more or less successful in dealing with the diversity of human situations. Latin America has also made “the principle of equality” the core of its legal system. However, by comparison, it would be easy to agree that it was far more difficult to uphold and maintain there. Liberalism seems to have grown in Europe from a local seed, well suited to a balanced and ethnically more homogeneous society. It is the offspring of a long process of historical development that led to modernity. In Latin America, it looks more like an exotic plant, growing fragile in an inhospitable terrain of extreme inequality, ethnic divides and hindering traditions.

Pedro Ribeiro’s account of Brazilian intellectuals is a good example of this vision. The authors he analyses “usually highlighted the anomalous, pre-modern and backward character of Brazil” in comparison with European societies. Resilient “remnants of the past” functioned as impediments to modernisation. Miscegenation, the “affective, irrational, passionate” character of its inhabitants, slavery, the power of landlords in a plantation regime, a “personalist culture”, the absence of a middle class, corruption and patron-client relations: all of these elements precluded the formation of a “civil society” or even of a real, amalgamated nation. Liberal principles such as freedom and equality before the law were almost impossible in such an environment. For Brazilian intellectuals they were, however, still valuable goals that needed to be achieved, so the inevitable conclusion was that society had to be transformed in accordance with the European model.

Among the solutions proposed was immigration – both for the educational and biological modifications it would bring to the local population –, moral reform through education and the development of small property and industries, so as to create a local middle class and bourgeoisie. Francisco José de Oliveira Vianna added that, in the absence of enough impulses from society itself, the State needed to play a more active role. There was no room for “naïve legalism”, at least not at the beginning. In order to make Brazil worthy of liberal ideas, a “temporary authoritarianism” would be needed.

There are plenty of similar conceptualisations in Argentina’s intellectual history. The incapacity of the local population for progress due to racial/ethnic issues was pointed out by many liberal-minded figures, from Domingo F. Sarmiento to most of the positivist thinkers of the early 20th century. The positive impact of European immigration and of small property holders was taken as a given by most. While not necessarily from a corporatist standpoint, they all agreed that the State needed to play an active role in reshaping society through education and demographic and economic reforms. Like the rest of his fellows of the *Generación del 37*, who criticised the ‘naïve’ liberalism of their Rivadavian predecessors, one of the founding fathers of Argentine liberalism, Juan B. Alberdi, also argued that full political citizenship for the lower classes should be postponed for better times. Liberalism was still a goal for all of them, but they acknowledged that society was not ready to embrace it fully. As in Brazil, Europe (and its daughter, the US) was the standard of the good society. The *criollo* land was, on the contrary, a place of absences, obstacles and failure.

1 Out-of-place ideas?

In this style of reasoning, the aspiration to a liberal legal order appears combined with racist assumptions and authoritarian institutional designs, which may seem paradoxical. Intellectuals were attracted to liberalism, as much as they felt sceptical regarding their actual chances of implementing a political organisation based entirely on its principles. In order to understand this ambivalence better, Ribeiro takes on board Roberto Schwarz’s famous 1973 notion (updated in 2011) of “out-of-place ideas”. According to Schwarz, in its European cradle, liberalism was a more or less accurate description of reality (or, at least, of the tendency of historical development). That said, this correspondence between political horizon and reality is what is missing in

peripheral spaces such as Brazil and Argentina, which in turn explains why intellectuals there were so anxious as to the chance that liberalism would grow in local soil as much as they were eager to find not only recipes for making it happen in the future but also explanations as to why it was not happening at that time. Following Schwarz's train of thought, Ribeiro argues that, rather than descriptions of Brazilian realities, the intellectuals' ideas should be understood as "political projects" that strive to set up a civil sphere and a particular legal system for Brazil. As such, they are strongly normative: Europe is the universal norm to which the local, singular reality needs to adapt. Not surprisingly, as Ribeiro argues, this type of argument relies on identifying "missing elements" as explanation for an actual state of affairs: if Brazil is not "modern" it is because it lacks something that Europe has. Brazil is then imagined as a land of absence, the negative image of the Old Continent.

The notion of "out-of-place ideas" has been rightly criticised on the basis it assumes that ideas may belong within some realities and not (or less so) within others.¹ Liberalism is part and parcel of modernity; in the less (or no) modern peripheries, liberal ideas acquire strange, distorted physiognomies. Yet, many of the elements of the alleged 'modernity' of Europe should also be understood as projects rather than descriptions of reality. Some of the very concepts that configure our perception of modernity convey implicit ideological ambitions. Take for example 'civil society', considered by one of the authors discussed by Ribeiro as non-developed or crushed by the Brazilian State. This notion has received much criticism in postcolonial and subaltern studies. Dipesh Chakrabarty and Rosalind O'Hanlon have challenged the claims to universal validity of liberal categories such as 'citizenship' or 'civil society', on the basis that "they have been deployed in the 'colonial theatre' in aid of dubious projects aimed at 'civilizing' the natives or encouraging their 'development'". Thus, "the native or subaltern, who is incapable of being a sovereign self-legislating subject (because of savagery, traditionalism, inarticulacy, unruliness or poverty) cannot participate in the public political space of *civil* society". In short, liberalism's narratives of citizenship thus have played a part in assimilating to the project of the modern state "all other possibilities of human solidarity".² In relation to this, Julia Fieldhouse has

1 See PALTI (2014).

2 CHAKRABARTI (2000) 4 and 45; IVISON (2000) 2026 (quote).

analysed the way in which the idea of civil society was used as a key notion in the making of a European narrative of world history. Civil society, “from its earliest employment by philosophers through to its contemporary usage by social scientists, has been used as a comparative mirror”. By means of such a mirror, the narrative of European identity “assimilates the other in the form of a negative image”. Thus, philosophers such as Montesquieu, Ferguson, and Hegel constructed the notion of the centrality of civil society in modern (European) societies by using images of non-European peoples, who, by the same token, were excluded from the ‘modern’ world. The author concludes that contemporary uses of the idea of civil society continue to betray a hidden normative will; in other words, they implicitly establish Western Europe or the United States as the norm of (good) society, to which all other societies should aspire. The alleged failure to pass the test of modernity was (and still is) used to claim the right to control the destinies of such peoples.³

Thus, the notion that ‘backward’ populations are deprived of some of the elements that make Europe ‘modern’ and are therefore not suited for citizenship is not a discovery of out-of-place intellectuals of the periphery wanting to explain their singular situation: it is also ‘at home’ at the core of liberalism, and it was there well before anyone in Latin America formulated it in those terms. It is important to note that the exclusionary dimension to such notions applies not only to the ‘savages’ but also to fellow humans in Europe: ‘civil society’ was also a disciplinary project for them. Uday Singh Mehta referred to this issue as “liberal strategies of exclusion”. According to Mehta, liberalism includes an inherent thrust toward exclusion, stemming from its own theoretical core. In the formative years of the liberal tradition, John Locke made it very clear. Human beings can only be considered part of political society if they are capable of having a ‘civil’ behaviour. Only someone who is ‘owner of himself’ – the idea of property is the blueprint here – can participate autonomously in social life. Children, idiots, people not endowed with ‘reason’ in general, are incapable of their rational consent to be ruled by a political authority. They therefore need to live under the authority of others (or of the political society that others have built). Thus, behind the capacities that liberalism supposedly ascribes to all human beings, “there exist a thicker set of social credentials that constitute the real

3 FIELDHOUSE (1997) 6, 130, 193 ff., 262, 284–286.

bases of political inclusion". The universalistic reach of liberalism "derives from the capacities it identifies with human nature and from the presumption, which it encourages, that these capacities are sufficient and not merely necessary for an individual's political inclusion". In this fashion, individuals, social groups and peoples presumed, through subtle invocation of social conventions, to lack the 'capacity' for self-determination, become subject to exclusion and /or domination. The usual 19th-century depiction of non-European peoples as being in the 'infancy of civilization' – thus allowing the imposition of paternal guidance – is a good example of this. In narratives of the West and its others, the insufficient development or lack of civil society was often constructed as one of the symptoms of the lack of such 'capacity'.⁴

That said, something similar happened at home, where sections of the population were also depicted as not endowed with enough 'reason' to be part of civil life. In this respect, Helmut Kuzmics has examined the idea of civil society in the light of Norbert Elias's account of the "civilising process", that is, the development of the apparatus of self-restraint. Participation in 'civil' life (and therefore in 'civil society') thus appears to be tacitly conditioned to the achievement of "the kinds of self-control involving dignity, tact, and a splendidly polished public front". Un-*civil* social groups are excluded *ex definitione*.⁵ It must be remembered that, in Elias's landmark study, the patterns of behaviour associated with the apparatus of self-restraint (that is, 'civilisation') were initially an aristocratic device for distancing the historical nobility from the newly enriched bourgeoisie. Later, the bourgeoisie adopted those patterns to distance itself from the lower classes. This elitist ideal of behaviour was projected onto the whole of society, thus establishing a gradient of 'civility' from the higher ranks to the lower classes. And this is where the idea of civil society and the narrative of civilisation connect with liberalism as class ideology: in the implicit ideological premises of liberalism (if not explicitly in its doctrine), civil society, like civilisation, is not inhabited by all humans alike, but only by those who act within the limits of the acceptable 'civil' (bourgeois) behaviour. This sort of implicit notion often had an institutional transcription. For example, as Pierre Rosanvallon has shown, the French liberal politicians of the mid-19th century (some of whom were also liberal thinkers, such as François Guizot), argued that the

4 MEHTA (1999).

5 KUZMICS (1988) 173 (quote).

right to become a citizen was reserved for those who were able to display the 'capacity' for the role, and not all adult human beings were endowed with such intellectual 'capacity'. By default, poor people were assumed to be incapable. For Guizot and his associates, owning property was the best indication that someone was capable, and that is why they were advocates of censitary suffrage and enemies of democracy. When the tide of democracy became unstoppable and censitary suffrage was no longer tenable, they designed other ways to 'domesticate' the citizenry, through education and elitist institutional devices (such as bicameralism).⁶

Summing up, neither the depiction of Brazil as 'lacking' this or that element, nor the combination of ideals of equality with institutional practices of exclusion was something peculiar to Brazilian (or Argentinean) intellectuals. The ideas we are dealing with in this paper were 'out of place' in Europe as well, so to speak. Modernity and liberal arrangements were as much a 'project' in Latin America as they were on the Old Continent, and, as more and more historians have shown in the past years, Europe was a lot less 'modern' than the narrative of modernity would have us believe. Moreover, modernity itself can be described as an intrinsically fractured process.⁷ The principle of equality suffered 'local' adaptations and required institutional compromise everywhere.

Among the ideas of the Brazilian intellectuals analysed by Ribeiro, there are other good examples of the inner connection between European narratives of success and the anxieties and ambivalences of the periphery. The topic of the 'absence of a middle class' as an explanation for backwardness is indeed an old one. Again in this case, it was not developed by intellectuals of the periphery looking for answers for their particular situation, but rather by their European counterparts. After the late 18th century, some groups of liberal politicians and intellectuals in France and England proposed a 'juste milieu' moderate political programme, between the extremes of the Ancien Régime and the danger of the new, radical republicanism. It was then that the very expression 'middle class' started to spread, as part of a new narrative according to which the 'miracle' of European civilisation was produced by free trade, cities and the entrepreneurial bourgeoisie. As with the notion of 'civil society', the non-European world was used as the other through which

6 ROSANVALLON (1985) 49–50.

7 See JOSHI (2001).

this vision would solidify. Thus, after the late 18th century, the idea that backwardness was due to the absence of a ‘third estate’/‘middle class’/ ‘bourgeoisie’ became commonplace. The idea that that shortcoming could be overcome through immigration – by ‘implanting’ European settlers who would ‘educate’ the natives by transmitting to them their entrepreneurial values – was already under discussion in European intellectual circles in that century.⁸ Moreover, the same applies to the ‘solution’ that Oliveira Vianna envisioned in the 1930’s. The idea that the State should refrain from intervening in social and economic life in modern nations but needs to be very assertive in backward countries so as to remove obstacles and create the pre-conditions for Progress was already presented by Jeremy Bentham in 1800.⁹

There is nothing ‘out of place’ in all of these ideas: the tensions between equality and inequality, citizenship and exclusion, freedom and force, are constitutive of the liberal tradition.

2 Ethnic difference and the principle of equality

The way ethnic difference was dealt with in Argentina is a good example of how legal equality may relate to modernity and backwardness in counter-intuitive ways. In 18th-century colonial Latin America the population was legally divided into ‘castes’ (*castas*), a complicated system of ethnic-racial labels associated with differential access to rights and prerogatives. Those considered ‘white’ were at the top of the social pyramid; access to that condition required a formal certification of ‘purity of blood’. Some of the Whites (although only few in the territory of Argentina) were noblemen in addition, which granted them a whole set of immunities and special prerogatives. All those who were not ‘pure’ were classified in one of the several castes. There were initially five main groups: *Negros*, Indians, and the breed of these two – *Zambos* – and with Whites, – Mulattoes and *Mestizos*. The three possible combinations were later divided into subtypes according to the proportion of their components, which gave way to more labels, such as *tercerón*, *cuarterón*, *mulatoprieto*, among others. The Indians were subject to tribute. As some *Negros* were eventually emancipated, there was also the distinction between those who were free and those who were slaves. The

8 ADAMOVSKY (2005) and (2009).

9 ADAMOVSKY (2010).

castes were the basis of a whole system of legal segregation that, of course, also relied on informal practices. In principle, non-whites were unable to occupy positions of authority, whether in the civilian, religious or military apparatus. There were at times other restrictions, such as on carrying weapons, walking alone at night, receiving education together with Whites and being finely dressed. More importantly, the non-white – with some exceptions, especially in frontier cities – could not be considered “vecinos” (neighbours), who were the only ones who had the right to participate in city politics through the Cabildos. That said, all had the right to seek judicial support if they felt their rights were being violated. Even slaves had that entitlement, which they often used (sometimes winning cases in Court against their masters). Needless to say, this legal arrangement based on ethnic-racial differences was accompanied by a whole set of beliefs and stereotypes regarding the moral attributes of each group, which in turn also affected social relations and access to job opportunities. Those who were at the bottom of the scale of ethnic-racial prestige were usually the most disadvantaged economically. In theory, caste was determined by birth and therefore permanent, but, in practice, there was a certain mobility. Economically successful ‘impure’ people sometimes managed to pass for White and even to get an official certification of ‘purity of blood’ (although very dark-skinned people were less likely to benefit from these possibilities). The *Mestizo* condition could also be bred out by repeated intergenerational marriages with Whites (one eighth of indigenous blood or less was considered White). Conversely, a very poor person of purely European ancestry was often assimilated into the *Mestizo* classification in social interactions. In sum, ethnic and class categories some extent overlapped.

In Argentina, the revolution of Independence soon abolished this extremely unequal order and adopted instead a republican legal system based on the principle of equality. This happened in no small measure because the lower classes, some indigenous nations and many people of African descent actively participated in the anti-colonial struggle. By 1813, castes, indigenous tributes and the nobility were abolished, a great step toward legal equality for all men, which however did not include slaves: the freedom of wombs was ensured, but the abolition of slavery did not occur until 1853 (or 1860 in the province of Buenos Aires, the stronghold of the liberal élite who would organise the Argentine State). For the indigenous population, equality brought new rights but also the loss of others. Most

pueblos de indios (indigenous towns), which had the right to have their own local authorities, were dissolved, thus depriving them of formal ethnic leadership. As communal rights over the land were not recognised either, many communities lost access to their ancestral territories. Paradoxically, legal equality made them less equal in actual terms. Their legal status as equals, on the other hand, was not always secured: in Jujuy, for example, the old Indian tribute was for some time reestablished under the name of *contribución indígenal*.

Moreover, in 1813, the sovereignty of the people was proclaimed, and, as early as in 1821, the province of Buenos Aires established that all free adult males would have the right to vote, regardless of colour or social condition (however, only propertied men were allowed to run as candidates). It was the first law of male universal suffrage in Latin America, and it was passed at a time when most European countries reserved political citizenship for the wealthier part of society or did not hold elections at all. This early democratic feature of Buenos Aires was soon imitated by the rest of the provinces, except for Córdoba and Tucumán; after the approval of the Argentine Constitution in 1853, universal male suffrage was enforced in all provinces. Elections were far from being transparent at that time, but lower-class voters – including non-white – did participate in relevant numbers. The electoral law of 1912 finally established procedures to ensure truly transparent elections; from that point, universal male suffrage was a reality. At that time, the majority of Latin-American states had restrictive electoral legislation and, even in Great Britain censitary suffrage remained in place until 1918. Some states of the United States demanded literacy tests and/or the payment of a poll tax before authorising prospective voters as late as in the 1960s, an indirect way of excluding racial minorities. In terms of the principle of (male) equality, Argentina was then more ‘modern’ than nations that are usually considered as such.

Argentina’s early laws and then the Constitution, Civil Code and electoral legislation made no ethnic-racial distinctions whatsoever, but that applied fully to inhabitants of the pre-existing political units that agreed to submit to them, that is, the provinces. The situation was different beyond the frontier of ‘civilization’. After the 1853 Constitution was signed, the territory of the nation almost doubled. The nascent State invaded and incorporated large portions of land in Patagonia and in the Grand Chaco, until then the domain of ‘savages’, who were not immediately considered citizens.

The indigenous nations of those areas were subject to extreme forms of violence, including the reduction to quasi-slavery of some of those who were captured in the great campaign in Patagonia after 1879. The fundamental civil rights granted by the Constitution and the Civil Code to all inhabitants did not protect them. Universal in the text, they were not actually so in reality, and there was also some ambivalence in legal texts themselves. While the laws granted generous freedoms for the individuals to pursue their own lives the way they wanted, they also mandated the State to ‘reduce’ indigenous communities to civilisation (even the Constitution, which ensured freedom of religion, indicated that the aboriginal peoples *had* to be educated in the Christian faith).

That said, it is, however, important to note that the differential access to legal protections did not translate into different formal rights according to someone’s colour or ethnicity, this not even in the electoral domain. During the long process of emancipation, formerly free Afro-Argentines enjoyed the same formal rights as Whites. Slaves were often granted the intermediate status of freedmen (*libertos*), which included similar restrictions of rights as in other countries, but after the process ended, all Afro-Argentines were acknowledged as citizens with equal rights as Whites (or, to put it more accurately, the law was colour blind). In the 1870s and later, they indeed played an active role in electoral politics, and there was nothing in Argentina comparable to Jim Crow laws in the United States, nor any open system of segregation in the public sphere. Moreover, Afro-Argentines managed to use the principle of equality before the law to fight private acts of discrimination. That happened for example in an incident in Buenos Aires in 1879, when the owner of a dance venue publicly announced that Blacks and Mullatos would not be allowed. The Afro-Argentinean community mobilised and, with no difficulty, secured the support of the chief of police, who immediately forced the owner to admit customers of any colour on the grounds that racial discrimination was illegal.¹⁰ Needless to say, an informal ‘pigmentocracy’ remained (and still remains) at work in Argentina, but it relied mostly on private decisions rarely acknowledged publicly. By comparison, then, 19th-century Argentina was far more ‘modern’ than the United States, where the Supreme Court declared bans on interracial marriage

10 GELER (2010).

unconstitutional as late as in 1967 (Alabama only removed those prohibitions by its laws in 2000).

Equality before the law in late 19th-century Argentina, however, was connected with a particular narrative endorsed by the State. According to this official discourse, Argentina was an exclusively white-European nation. Inhabitants of African or Amerindian descent were not recognised as such or were acknowledged only as tiny remnants of the past with no demographic significance, dissolved into the massive torrent of European immigrants. The first census carried out by the federal State included no questions regarding African or indigenous ancestry, for it was assumed that such a question would be superfluous. Non-whites thus became invisible. The master narrative of the nation revolved around the idea of a ‘melting pot’, out of which a new, perfectly white and European ‘Argentinean race’ emerged.¹¹ The effectiveness of this myth could only be maintained at the cost of a constant ‘cultural patrolling’ in order to deny or to corner the non-white presences, so as to force them to adapt, remain invisible or perish, which, of course, gave way to new, less visible forms of violence.¹² This fantasy of white homogeneity was intrinsically related to the strength of the principle of equality in Argentina’s legal order. The law was radically equal for all, but the cost of that decision was that no actual distinctions could be made among the Argentinean people, which of course left little room for collective demands of the non-white minorities. Individuals of any ethnic backgrounds would be considered equal, provided they underplayed their ethnic difference. This *quid pro quo* helps to explain why the whitening discourses were so successful. The Afro-*porteños*, for example, who were very visible in the public sphere and had their own associations and press, suddenly became invisible in the 1890s. The community still existed, but it no longer published community-specific newspapers or made its views publicly manifest. This happened owing to the whitening pressures of the State, but also because they came together with an actual promise of legal equality which, as Lea Geler has shown, the Afro community decided to embrace.¹³

A clear example of this implicit relationship between equality, discourses of ethnic homogeneity and invisibility can be found in the way the State

11 QUIJADA et al. (2000).

12 SEGATO (2007) 30.

13 GELER (2010).

behaved in the newly conquered lands. By a law of the Congress passed in 1884, those lands were declared *Territorios Nacionales* and put under the administration of the federal government (they would continue with that status until they were transformed into provinces like the rest, which, for most of the *Territorios*, only happened in the 1950s). The practical outcome was that their inhabitants would not have the right to choose their own governors and representatives for the Congress, nor to participate in presidential elections. That said, nowhere in the congressional debate was the issue at stake the intellectual ‘capacity’ of the indigenous people. There was no intention to exclude anyone politically. If the new territories were deprived of political citizenship, it was purely on the basis of their sparse population – the law actually made provision for locals to have the right to elect their own authorities as soon as the population increased enough to justify it (it had to reach a minimum of 30,000).¹⁴ Even so, when reading through the debate, it becomes obvious that the members of Congress had in mind the white settlers of those areas, otherwise depicted as “*desiertos*” – that is, mostly devoid of inhabitants – which, of course, they were not. There was no need for a differential set of political rights for the ‘savages’ simply because they became invisible very soon after the occupation of their land was complete (It must be borne in mind that aboriginal individuals from ‘civilised’ groups in the provinces were considered citizens with equal rights).

By comparison with Argentina, the principle of equality emerged in Brazil much later, and, for some time, it was more restricted. Slavery was abolished in 1888, and the Republic was proclaimed in 1889. Following imperial precedents, large groups of the population were excluded from the right to vote, including the indigenous peoples, illiterates and beggars (and of course women). Some of these limitations remained in place for almost a century: illiterates were only allowed to vote after 1985; at that time, around one fourth of all adults were still in that condition, with great regional variations. As illiteracy was particularly high among ethnic minorities, that restriction meant that a large number of Afro-Brazilians and indigenous people did not enjoy political citizenship, even if there were no legal forms of exclusion on grounds of ethnicity or colour. In addition, the *Estatuto do Índio* (1975) granted equal rights to aboriginal peoples if they were

14 GALLUCCI (2016).

‘civilised’ and integrated into Brazilian society, but established formal limitations for those who remained ‘isolated’. As in Argentina, in Brazil, the State also endorsed a unifying myth that accompanied the principle of equality before the law. However, in this case, it revolved around the idea of “racial democracy”, which was also a fantasy, but at least acknowledged the presence of non-whites.

In both Argentina and Brazil, the principle of equality and discourses of racial homogeneity or racial equality made it more difficult the emergence of special legal provisions to uphold the rights of ethnic minorities. This only started to happen relatively late and was in part due to the influence of the vision of multiculturalism coming from the north. The Brazilian 1988 Constitution included special clauses to help preserve Afro-Brazilian and original people’s cultures and lands, thus creating a breach in the principle of equality. After that, other legal dispositions ensued, such as the much-debated racial quotas at federal universities implemented in 2012. Argentina’s 1994 Constitution also acknowledged the original inhabitants and provided special rights to protect their cultures and consolidate their lands. On the contrary Afro-Argentines – a small group in comparison with Afro-Brazilians –, were not mentioned, nor were there any affirmative-action programmes for them.

By comparison, the United States has had stronger and earlier policies of affirmative action for racial minorities. For Afro-Americans, that story starts in the 1960s, whereas, for the indigenous nations, there is an older and more complicated picture of acknowledgments and special provisions regarding communal lands and other ethnic rights. As for political franchise, the Fourteenth Amendment (1868) extended full citizenship to every person born in the United States, but it was interpreted as excluding indigenous peoples. It was only the Indian Citizenship Act of 1924 that extended the right to vote to all native Americans (who, nevertheless, were affected by Jim Crow laws in the South just like Afro-Americans). The fact that policies of affirmative action for ethnic minorities (and, generally speaking, racial politics and the values associated with multiculturalism) arrived later in Brazil and Argentina is often interpreted as a sign of their lagging behind in terms of equality and ‘modernity’. In view of the elements discussed in this paper, we should perhaps challenge that assumption.

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Section II

Legal Lines of Development of Discrimination and Anti-Discrimination

Discrimination: On the Constitutional History of a Fundamental Concept – a Chilean Perspective

1 Towards a conceptual history of discrimination

Discrimination is a social phenomenon that can be studied historically through the exploration of the societal patterns, behavioral strategies, cultural symbols, and economic arrangements that organize, materialize, and reproduce the multiple and heterogeneous sources of structural disadvantage that affect various human groups as a whole within past and present societies. The word *discrimination*, however, is also a linguistic convention that brings these phenomena to our minds when pronounced; a concept that condenses them semantically. For this reason, it is also possible to approach historically the social phenomenon that we now call discrimination using as an entry point the study of the construction, circulation, and appropriation of the concept that bears this name, the concept of discrimination, in order to understand its place within our sociopolitical vocabularies and to cast light on its continuities and changes over space and time.

The idea that discrimination is a concept that forms part of our fundamental sociopolitical vocabulary follows from the theory of historical concepts articulated by Reinhart Koselleck. Developing Nietzsche's aphorism that only that which lacks history can be defined, Koselleck¹ established a difference between 'mere' words, which can be defined because their uncontroversial use in everyday speech endows them with a relative stability in their meaning, and concepts, which present an irreducible ambiguity not despite but because of their being central components of sociopolitical discourse. Participants in processes of social communication use these concepts to articulate what, drawing from hermeneutics, Koselleck² termed their "space of experience" and their "horizon of expectations", a use that gives

1 KOSELLECK (2004) 76.

2 KOSELLECK (2004) 259.

them considerable fluidity; on top of that, their fundamental role in expressing sociopolitical experiences and expectations meant, as Carl Schmitt³ had already observed, that these concepts tend to be used in connection with some of the fundamental conflicts that divide the respective society and therefore in a polemical sense. Concepts employed in sociopolitical discourse appear from this perspective as words loaded with history; and conceptual history becomes not a history of words, but rather an attempt to study social beliefs, experiences, and expectations in a temporal perspective.

The concept of discrimination manifests itself in a variety of words. Using the root morpheme *discrimin-* to create verbs (*to discriminate*), adverbs (*discriminatorily*), nouns (*discrimination*), and adjectives (*discriminatory*), it is possible to construct a rich conceptual vocabulary on discrimination that allows us to express an infinite variety of statements about the social phenomenon in question, including the expression of abstract ideas and the description of concrete actions and behavioral patterns of individual, institutional or collective agents. These words draw their meaning from a socially shared understanding of what kinds of phenomena we would describe using them, and serve as semantic support to the elaboration of subsequent conceptual neologisms such as *reverse discrimination* and *anti-discrimination law*.

The words that make up the constantly growing vocabulary about discrimination, however, are far from being the only elements that determine semantically and pragmatically the concept of discrimination. In fact, they are not necessarily the most useful ones for a true understanding of its meaning. We find in its orbit a variable constellation of concepts such as *prejudice*, *stereotype*, *disadvantage*, and many others with which the concept of discrimination maintains relations of semantic similarity or opposition, that can often be expressed in various degrees of intensity, and relations of pragmatic complementarity or exclusion, manifested in whether speakers need to use them or need to refrain from using them in order to avoid confusion or embarrassment and to gain clarity and expressivity. These related concepts, the precise identity of which at any given place and time is a matter of social convention always open to challenge and change, allow speakers to explain without falling into tautology or repetition the abstract conceptual meaning of discrimination and the concrete discursive uses of its cognate vocabulary.

3 SCHMITT (2008) 89.

In the case of discrimination, constellations of semantically related concepts also allow us to differentiate discrimination as a concept that describes the historical phenomenon of structural disadvantage from discrimination as a ‘mere’ word that means, as the Oxford English Dictionary puts it, the “recognition and understanding of the difference between one thing and another”. One of the questions that conceptual history as an approach opens up is, in fact, what is the historical relation between fundamental socio-political concepts and their associated ‘mere’ words. Certainly, that there actually is a difference between discrimination as a fundamental concept of sociopolitical vocabulary and discrimination as a ‘mere’ word is a historical intuition that demands historical justification, both in terms of the primeval emergence of this semantic and pragmatic differentiation and of its effective existence in more discrete and circumscribed historical contexts.

The concept of discrimination maintains a close connection with the legal world, from which it seems to extract in part its distinctive meaning. This is not to deny the role that the social experiences of discrimination play in giving actual historical content to the concept; the point in question is what the semantic and pragmatic specificity of using the conceptual vocabulary about discrimination is. In this sense, it seems safe to suggest that discrimination is conceptually conceived of in the contemporary world even by non-lawyers as an unjust harm inflicted on an undeserving victim by a blameworthy agent basing his actions on impermissible reasons. For this reason, whenever the terms of this vocabulary are used to describe existing events or phenomena of the social world, they are performatively used almost inevitably in an accusatory and reproachful manner that calls for determining the responsibility of the agent behind the act or situation in question. It seems difficult to describe an action or a phenomenon through this vocabulary in a way that does not imply a negative judgment about the action or fact referenced by the discourse. Its use always therefore implies a potential factual and normative inquiry, even a non-legal one that justifies it by demonstrating the negative character of what it describes. The use of the conceptual vocabulary about discrimination is, to be sure, nevertheless not inevitable; speakers always have at their disposal alternative conceptual and terminological systems that would discursively silence all its implications, describing the same phenomena in a neutral, positive, or just different way.

Describing actions as discriminatory calls into question the responsibility of the agent that controls a certain course of events, but, while a consciously

discriminatory intention may be present in agents whose actions are described as discriminatory, it is also possible that this is not the case, as complex social causes and dynamics can create discriminatory effects out of innocuous behavior. The concept of discrimination, therefore, not only involves the potential formulation of normative and factual questions about individual responsibility, about who discriminates and who is discriminated against, it also raises questions about social causality with regard to which social markers trigger a specific form of discrimination, what the historical background is which has made it possible in the *longue durée*, and how it can be overcome.

These broader social questions implicit in the concept of discrimination are worth noting as we reflect on the conceptual history of discrimination. The very possibility of raising them did not exist within the conceptual framework of the liberal system of individual responsibility articulated during the 19th century in Europe and the Americas by “classical legal thinking”.⁴ They would have been regarded as incoherent by the Eurocentric, patriarchal, and bourgeois constitutional culture of the era, characterized by exclusionary constitutional definitions of citizenship, the confinement of the judiciary to protecting property and contracts and punishing criminality, and a doctrinal focus on political institutions rather than on rights. Those questions are intelligible only within the structuralist legal mentality that arose in democratized constitutional orders during the first half of the 20th century as a response to the challenges to those older constitutional ideas and legal doctrines raised among others by Léon Duguit and the American legal realists; a mentality that gave conceptual coherence to the ‘social’ initiatives to achieve distributive justice through systems of social and labor protection that redistributed some capitalist wealth and through systems of civil liability that redistributed some of the costs of industrial risks. The conceptual history of discrimination, in that sense, seems to be deeply linked in modern constitutional democracies with the rise and crises of what can be broadly described as social law. To use a Foucaultian term, the concept of discrimination seems to have as its ‘historical a priori’ significant transformations in the fundamental principles and values of the modern constitutional tradition that made it possible for us to regard the prohibition and reparation of certain forms of social disadvantage

4 KENNEDY (2006).

as an international human-rights imperative, an intrinsic consequence of the constitutional principle of equality, and a meta-guarantee of constitutional rights.

The concept of discrimination, as a component of our vocabulary that, over time, has acquired social meaning and political legitimacy, has gained such an importance in the modern world that many legal systems and jurisdictions have deemed it necessary to include it, define it, and employ it in constitutional and other fundamental legal documents. This suggests that the conceptual history of discrimination can be approached through the study of constitutional and other legal materials, including not only constitutional clauses but also their application to the concrete ordering of society through landmark legislation or paradigmatic judicial opinions with the aim of finding in them concrete contexts of employment of this concept that we can arrange diachronically and compare synchronically in order to gain an idea of its variations through space and time. Bearing in mind the conceptual difference and sometimes the substantive distance between fundamental concepts of sociopolitical discourse and those same concepts as defined by authoritative and doctrinal sources, these materials nevertheless offer us the possibility of understanding how constitutional drafters, political and judicial authorities, legislators, and even scholars try to influence through their conceptual definitions and rhetorical uses not only future decision-making processes and actions but also the underlying social understandings of those fundamental concepts, as well as to assess to what extent they recognize and reflect these social understandings in their operations.

I shall briefly explore three episodes in the conceptual history of discrimination in order to illustrate these points. The first seeks to provide historical support for the intuition that, at some historical point, a differentiation emerged between discrimination as a 'mere' word and discrimination as a fundamental sociopolitical concept. The second and third episodes proceed to examine the appropriation and application of the concept of discrimination in Chilean constitutional law. The second episode examines the incorporation of the concept of discrimination in the constitution that the dictatorship led by Augusto Pinochet enacted in 1980, a step that gave the political forces that stood behind the regime the opportunity to overdetermine the field of political and legal dispute for years to come. The third episode examines a set of judicial decisions on the rights of sexually diverse persons in order to examine whether the concept of discrimination has contributed

in postdictatorial Chile to further judicially the rights of groups who, historically, have suffered from discrimination.

2 The emergence of the concept of discrimination

It seems advisable to recognize from the outset that it is often impossible to identify specific moments in which ‘mere’ words become fundamental concepts of sociopolitical vocabularies; we can only identify the main historical tendencies that led to that result. Furthermore, it would seem as though a certain reification, the formation in the mind of individuals of the belief that there exists as a matter of fact a social phenomenon endowed with such prevalence and significance that deserves to have a name of its own, is necessary for a concept such as discrimination actually to exist as something different from a ‘mere’ word that comes up in social and political speech. In that sense, the conceptual history of discrimination has as its background deep and still ongoing cultural changes that have brought significant parts of modern societies to believe that long-standing social hierarchies and exclusions are incompatible with the common dignity of humans and with egalitarian understandings of the rule of law. Those processes, that can only be hinted at here, also form part of the ‘historical a priori’ of the concept of discrimination.

Etymologically, the versions of the word *discrimination* that exist in modern languages find their common root in the late Latin word *discriminare*, which comes from *discrimen*, an older Latin substantive meaning distinction or difference, a substantive that is in turn derived from the verb *discernere*, the prefix of which, *dis-* indicated division or separation, while its morpheme, *cerno*, a cognate of the Greek word κρίνω, indicated the capacity to perceive, to separate, or to judge.⁵ During the Middle Ages, this word family accumulated connotations of both concreteness and risk. At least two words were used in Latin at the time, as attested to by the French historian Charles Du Cange in his 1678 *Glossarium mediae et infimae Latinitatis*. One of them was *discrimen*, which Du Cange⁶ presented as an equivalent of διάκριμα, the ancient Greek word for a concrete distinction; the other was

5 GÓMEZ DE SILVA (1998) 228.

6 DU CANGE (1844) 3:133.

discriminare, which he defined as *periclitari*, a cognate of *periculum*. *Distinction* and *danger*, in other words, were the semantic cognates that helped define this word family in the Middle Ages.

Descendants of the Latin words *discriminare* and *discrimen*, however, fared differently in different modern languages. German, for example, did not include the word *Diskriminierung* until the 20th century; none of the editions of the great dictionaries of that language published during the 19th century, the *Deutsches Wörterbuch* first authored by Jacob and Wilhelm Grimm and the *Etymologisches Wörterbuch der deutschen Sprache* produced by Friedrich Kluge, defined any term belonging to this word family. Neither did the *Dictionnaire de l'Académie française* in its first seven editions, which span from 1694 to 1879, define any word related to it.

There is lexicographic evidence of the use in Castile of both *discriminare* and *discrimen* during the Renaissance. In his 1490 *Universal Vocabulario en Latin y en Romance*, the humanist Alfonso de Palencia defined *discriminare* in this way: “es partir entre sacar discernir, assi que discriminator es apartador y desatador de las cosas embueltas”; and defined *discrimen* as “peligro; distancia; trabajo; y algunas vezes muestra apartamiento de dos cosas que primero estavan iuntadas: como en el atavio delalas [*sic*] mugeres se dice discriminalia los ramales que son puestos para partir la crencha delos cabellos delas donzellas”.⁷ The destiny of this word family in Spanish in the following centuries, however, was to languish over the centuries until revived from outside its linguistic boundaries. At the beginning of the 18th century, the third volume of the *Diccionario de Autoridades*, the first dictionary published by the Real Academia Española, did not include among its entries the word *discriminar*; and, while it defined the word *discrimen* as “riesgo, peligro, o contingencia”, it stated that it was “voz puramente Latina”.⁸ The successor to the *Diccionario de Autoridades*, the *Diccionario de la lengua castellana*, maintains to this present day in its entry for the word *discrimen* a lexicographic symbol indicating that it has fallen into disuse. Neither *discriminar* nor *discriminación* appeared in any of the several editions of the *Diccionario de la lengua castellana* published by the Real Academia in the 18th and 19th centuries; the word *discriminar* made its first appearance only in the 1925 edi-

7 PALENCIA (1967 [1490]) 118.

8 REAL ACADEMIA ESPAÑOLA (1732), tomo 3, 298.

tion of the *Diccionario*, with the meaning of “separar, distinguir, diferenciar una cosa de otra” and accompanied by a symbol denoting it as a word used only in Argentina and Colombia. The first time that the Spanish *Diccionario* defined *discriminar* as “dar trato de inferioridad a una persona o colectividad por motivos raciales, religiosos, políticos, etc.” was in 1970.

The same word family experienced a different trajectory in English, where it was regularly employed throughout the modern age. In his influential *Dictionary of the English Language*, the prolific writer Samuel Johnson⁹ defined several words belonging to it, and illustrated the use of these terms by quoting reputed English writers from the previous two centuries such as the natural philosopher Francis Bacon, the chemist Robert Boyle, and the theologian Edward Stillingfleet. *To Discriminate* was defined as “1. To mark with notes of difference; to distinguish by certain tokens from another” and “2. To select or separate from others”. *Discriminateness* was given as synonyms “Distinctness; marked difference”. *Discrimination* was given three meanings: “1. The state of being distinguished from other persons or things”; “2. The act of distinguishing one from another; distinction; difference put”; and “3. The marks of distinction”. *Discriminative*, lastly, was defined as “1. That which makes the mark of distinction; characteristical” and “2. That which observes distinction”. The closest semantic relative of *discrimination*, in other words, was *difference*. This, however, is clearly not ‘difference’ in the sense given to the word by contemporary literary theory or social studies, but in the socially and politically innocuous sense that something is dissimilar to something else.

The definitions in Johnson’s *Dictionary* show that, at the beginning of the 19th century, the verb *to discriminate* and the noun *discrimination* were commonly used in the English language. They do not, however, seem to suggest that they were used to express fundamental but contentious social and political claims; instead, they suggest that their role was to stand semantically for the action of making differences, the capacity to recognize differences, differences themselves that have been made or recognized, and the formal or material embodiment of the differences in question. Certainly, as is the case with many other ‘mere’ words, *to discriminate* and *discrimination* were sometimes employed in political and legal discourse; the question from

9 JOHNSON (1755) 606.

the perspective of a conceptual history of discrimination is whether they were used to articulate any experiences, expectations, or conflicts characteristic of that age or rather were used in discourse merely as a grammatical complement to the expression of those historical realities.

A letter that King Charles I of England sent in 1648 to the Prince of Wales offers us an interesting example to address that question. In it, the King gives his heir the following advice: “Take heed of abetting any Factions, or applying to any publick Discriminations in matters of Religion, contrary to what is in your judgment, and the Churches well settled.”¹⁰ A similar example comes from more than a century later and from the other side of the Atlantic, where, in 1777, the New York Constitution guaranteed “the free exercise and enjoyment of religious profession and worship, without discrimination or preference”. These two examples are challenging because, to the contemporary ear, they might sound like ordinary expressions of the idea of religious discrimination, i. e. of the structural disadvantage experienced by religious minorities in intolerant societies. However, if that were the case, the pragmatic implications of that conceptual sense indicate that in English sources of the 17th and 18th centuries we should find examples of individuals complaining in the first person about the “Discriminations” they suffered because of their religion, or of intellectuals discussing from the observer’s perspective the widespread problem of religious “discrimination or preference”. To put it in Wittgensteinian terms, that is the kind of language game that our concept of discrimination calls for and that would prove its presence at that time.

Such language games, however, are not available in the sources of that era, though certainly not because individuals in England did not experience prejudice and even persecution because of their religion during the first centuries of the modern age; it is instead because, at the time, other conceptual vocabularies were employed to think and to speak about those problems, from the traditional Christian discourse about heresy to the novel conceptual language of tolerance among similar Reformed Christian churches popularized by John Locke in his 1689 *A Letter Concerning Toleration*. In contrast, however, the two examples under scrutiny employ the word *discrimination* in a way that suggests its association with something

10 SANDERSON (1658) 1142.

more abstract and ahistorical than the experiences of those persecuted in an age of religious factionalism. When Charles directed his son to refrain from “discriminations” because they were communicative signals that could create political instability, he seemed to be using the word in the same way as those New Yorkers who employed the coordinating conjunction “or” to present “discrimination” as a terminological alternative, as a synonym, to the word “difference”. They all seemed to be using the word simply to mean the opposite of equality and the same as difference. We could say that, in these examples, *discrimination* is an analytical concept but not a historical one; a term of basic comparison, not a fundamental component of sociopolitical discourse – a ‘mere’ word.

While the word *discrimination* was employed in England during the 19th century, the concept of discrimination does not seem to have been generally employed or known. In 1871, it was still possible to publish in London a dictionary called, precisely, *Synonyms Discriminated*¹¹ that defined the word *discrimination* as “discernment in minute particulars, and of such a kind as leads to the acting upon the differences observed” and that put it in the same semantic category as the words *discernment*, *penetration*, *judgment*, and *discretion*. A second edition, published in 1890, made no changes or addition, and would still say, when defining the word *distinguish*, that “[i]n the sense in which DISTINGUISH is a synonym with DISCRIMINATE, it is used additionally in regard to physical objects, while DISCRIMINATE is only used of moral things.”¹²

Words related to *discrimination*, in sum, were scarcely used during the 19th century in Western Europe in languages other than English, and, in England, where the word was employed, it was not used as a fundamental concept of sociopolitical vocabulary, but rather as a ‘mere’ word. Both the word and the concept, however, were known and employed across Western languages early in the 20th century, as attested to by its use in a few provisions of the Treaty of Versailles in 1919, where it was employed to ban discrimination against Polish people (art. 104.5) and to prohibit discrimination among economic actors (arts. 50 Annex, 265, 323, and 329). The question then is how to account for this rapid reception of both the word and the

11 SMITH (1871) 252.

12 SMITH/SMITH (1890) 345. Small caps in the source.

concept of discrimination in these languages. In light of the evidence, it seems reasonable to search for the emergence of the concept of discrimination in historical processes and social debates that took place in English-speaking communities outside Great Britain during the 19th century, processes resulting, at some point, in some widespread experience of unjust social disadvantage beginning to be communicated in a way that led to the association of that phenomenon with the word discrimination. The best candidate for being the place of origin of the concept of discrimination is, in consequence, the postbellum United States.

The written opinions of the Supreme Court of the United States offer a valuable archive in which to search for those processes and debates. They suggest that discrimination did not begin its transformation from ‘mere’ word to fundamental sociopolitical concept in a linear and simple way. The first stage in that process seems to have been the increasing use of the word *discrimination* during the first half of the 19th century as a technical legal term to denote the act of drawing distinctions among economic actors, a usage that, over time, filled the word with connotations of impermissibility and unlawfulness. It is in that sense that the word family begins to be used at the time that John Marshall sat as Chief Justice of the Supreme Court. For example, in *The Samuel* (1816), Marshall wrote that a certain law “makes no discrimination between foreign and domestic wines and spirits, but deals with all alike”. In *Trustees of Dartmouth College v. Woodward* (1819), referring to whether the constitutional protection of contracts extended to the charters of private corporations, the Chief Justice ruled affirmatively arguing that “[t]here is no distinction or discrimination made by the constitution itself, which will exclude this case from its protection”, and, in *Brown v. State of Maryland* (1827), he warned of the risk that a state usurping the power of the federal government to conclude international treaties “may make a discrimination among foreign nations”. The Court continued to use the term in this sense after the Marshall era. While *Thurlow v. Commonwealth of Massachusetts* (1847) denied the constitutionality of “any discriminating tax” instituted by the states or the federal government outside their respective competencies, *New Jersey Steam Navigation Co. v. Merchant’s Bank of Boston* (1848) declared that, in the case under review, “Congress meant to discriminate between seizures on waters navigable”. This use reached its culmination in 1887 with the *Interstate Commerce Act*, which declared “unlawful” the “unjust discrimination” committed by all common carriers, who, in the transport of pas-

sengers and merchandise, established “greater or less compensation for any service rendered” for different people or gave any of them “any undue or unreasonable preference or advantage”.

During the second half of the 19th century, however, an important social phenomenon was taking place in the country after the Civil War: the emancipation of the population of African descent had created a new category of citizen, black men, who faced widespread forms of prejudice that prevented them from exercising the legal and political rights linked to citizenship, including the right to vote and the right to be judged by a jury of their peers. The XIV Amendment in 1868 and the XV Amendment in 1870, respectively, had recognized this new black male citizenship by guaranteeing all citizens the “equal protection of the laws” and prohibiting the restriction of suffrage “on account of race, color, or previous condition of servitude”. It is in this context that the word *discrimination* begins to appear in Supreme Court decisions to conceptualize illicit conduct motivated specifically by the race of the victim, reflecting the crystallization of social and political meanings around that word that was taking place and contributing to its definitional update.

The mentions of the word *discrimination* in the case law of the Supreme Court give us a glimpse into this process of conceptual crystallization. Interpreting for the first time the XIV Amendment in the Slaughter-House Cases (1873), the Court doubted that “any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision”. In *U.S. v. Reese* (1875), the Court declared that the XV Amendment guarantees the right to “exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude”; while, in *Strauder v. West Virginia* (1880), it asked itself whether citizens had “a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color”. During the 1880s, this use of the term continued, even as the Court embarked on the course that took it to validate racial segregation in *Plessy v. Ferguson* (1896). In the *Civil Right Cases* (1883), the Court said that “it would be running the slavery argument into the ground” if African-American litigants were allowed to invoke the protections of the XIV Amendment in the face of “every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or

admit to his concert or theater, or deal with in other matters of intercourse or business”; “there must be some stage” in the life of the freedman, said the Court, “when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men’s rights are protected”. In *Pace v. Alabama* (1883), the Court denied that, in legislation forbidding interracial marriage, “a discrimination is made against the colored person” and declared that “whatever discrimination is made in the punishment”, “is directed against the offense designated and not against the person of any particular color or race”. *Yick Wo v. Hopkins* (1886) enriched the nascent concept of discrimination both by employing it to describe the plight of another racial group, Chinese immigrants in California, and by recognizing the possibility that a law “fair on its face and impartial in appearance” can be applied “with an evil eye and an unequal hand, so as to practically to make unjust and illegal discriminations between persons in similar circumstances”, a doctrine that would have to wait almost a century to be taken seriously again by the Court.

At the turn of the century, in the year 1900, it was possible to read in volume 6 of the *Virginia Law Register* a short, unsigned note with the title “Discrimination against women in police regulations”, where the constitutionality of this problem was discussed, exposing perplexedly that “it is somewhat strange that the element of discrimination has not been discussed in this class of cases”.¹³ The anonymous authors of this analysis seem to have been conscious of the newness of the debate, but it seems harder to say whether they were aware that they were also innovating by expanding the range of matters that could be labeled as discrimination in the new, conceptual sense. Since then, the conceptual history of discrimination is to a large extent the history of the expansion of the social problems that have come to be conceptualized as discriminatory.

3 Constitutionalizing the concept of discrimination under Pinochet

While various forms of discrimination have historically existed in Chile, both the word and the concept were unknown to the Chilean constitutions

13 ANONYMUS (1900) 580.

of 1818, 1822, 1823, 1833, and 1925. The concept of discrimination was added to this last document through a brief mention in a politically significant constitutional amendment enacted in 1971, but it would be the 1980 constitution drafted by the Military Junta headed by Augusto Pinochet that decisively incorporated the concept of discrimination into Chilean constitutional law by mentioning it directly in arts. 19.16 (the right to non-discrimination in the workplace), 19.22 (the prohibition of economic discrimination by the state), 98 (the prohibition of discriminatory requirements by the Central Bank), and indirectly in art. 19.2 (the right to equality before the law), and additionally by creating a judicial remedy to protect art. 19.2, among other constitutional rights, against arbitrary or illegal omissions or acts. While it might seem paradoxical that a dictatorship contributed so significantly to importing into a constitutional tradition a concept such as discrimination, the historical context and the actual substance of its authoritative definitions explain the rationality of this decision.

One could be tempted to find an antecedent to the concept of discrimination in art. 12.1 of the 1833 constitution, which identified among the rights recognized for all inhabitants of the republic “[l]a igualdad ante la lei. En Chile no hai clase privilegiada.” Art. 10.1 of the 1925 constitution and 19.2 of the 1980 constitution copied this clause verbatim,¹⁴ making it the way that the principle of equality has been expressed throughout Chilean constitutional history.¹⁵ At the time that this clause was originally drafted,

14 Black slavery had been abolished in 1823 without compensation for slave owners during a period of liberal and progressive politics. The conservative 1833 constitution, recognizing this fact, declared in art. 132, among the “garantías de la seguridad i propiedad”, that “[e]n Chile no hai esclavos, i el que pise su territorio queda libre. No puede hacerse este tráfico por chilenos. El extranjero que lo hiciere, no puede habitar en Chile, ni naturalizarse en la República.” The drafters of the 1925 constitution decided to keep this declaration in their text, adding it as a second paragraph to art. 10.1, as a sign of their belief in a Chilean tradition of commitment to freedom. The drafters of the 1980 constitution followed their example for the same reasons.

15 The antecedent of this wording can be found in arts. 125 (“Todo hombre es igual delante de la ley”) and 126 (“Todo chileno puede ser llamado a los empleos. Todos deben contribuir a las cargas del Estado en proporción de sus haberes. No hay clase privilegiada”) of the 1828 constitution. This document embodied the progressive and liberal ideals of the government of the day, overthrown in 1829 by a reactionary military uprising organized and financed by the merchant Diego Portales. After the victory, Portales forced the election as president of José Joaquín Prieto, the general who led the army he had financed, and served as his Minister of Interior, Foreign Affairs, War, and Justice and Public In-

however, the principle of equality before the law and the prohibition of privileged classes were understood in Chile in the same way that similar constitutional principles and doctrines were understood by other bourgeois constitutional regimes of the 19th century: as little more than the establishment of a single, unified category of legal subjects, a universalistic notion conveniently restricted through exclusionary definitions of citizenship.¹⁶

The views of Jorge Huneeus, a congressman from the Liberal Party who taught constitutional law at the Universidad de Chile and published in 1880 a constitutional treatise titled *La Constitución ante el Congreso*, point in this direction. For Huneeus,¹⁷ the principle of equality meant that laws had to be the same throughout the country and that everyone had to be judged according to the same laws – nothing less, but certainly nothing more. He descriptively observed that this principle had no other exception than those established by the constitution itself, by means of which not everyone was able to vote or to hold office. Outside of those cases, he asserted vigorously, the equality before the laws had to be perfect, something that he saw materialized in the fact that, according to the 1855 Civil Code, laws applied equally to Chileans and foreigners. After briefly discussing the legal status of priests, his conclusion was that “Las leyes hoy vigentes en Chile guardan completa conformidad con los principios que brevemente dejamos apuntados.”¹⁸

What, however, did Huneeus have to say about the condition in his times of indigenous peoples or women from the perspective of constitutional principles? We do not know his views on race and ethnicity because, unlike the United States Constitution, the Chilean 1833 constitution was silent about relations with indigenous tribes.¹⁹ It could be argued that there was

struction. The 1833 constitution was written by his close ally Mariano Egaña and the 1855 Civil Code by his protégé Andrés Bello. Hailed historically by conservatives as the true founder of the Chilean republic, Portales believed, as he wrote in 1834 to a friend, that “con ley o sin ella, esa señora que llaman la Constitución, hay que violarla cuando las circunstancias son extremas. ¡Y qué importa que lo sea, cuando en un año la parvulita lo ha sido tantas por su perfecta inutilidad!” [ROMERO/ROMERO (eds.) (1986) 167].

16 TARELLO (1976).

17 HUNEEUS (1890), vol. 1, 102–103.

18 HUNEEUS (1890), vol. 1, 104.

19 This forms part of a continuous constitutional neglect of indigenous peoples that remained unmodified by the 1925 and 1980 constitutions. To this date, Chile is one of the few Latin-American countries that has not recognized its ethnic and cultural diversity in its constitutional document. There have been several legislative enactments throughout

nothing to say, since all indigenous inhabitants of the country, who during colonial times held the lesser legal status of “Naturales” that put them under the legal guardianship of “protectores de indios”, had been granted Chilean citizenship, and therefore full legal capacity, through an edict signed on March 4, 1819 by Director Supremo Bernardo O’Higgins; in light of art. 12.1, they were thus subject to Chilean laws and had the same rights as any other inhabitant of the territory. Huneus nonetheless did have the opportunity to express his views with respect to women, who, at the time, were entering into the public sphere and would soon be formally allowed to enroll in universities,²⁰ when answering a question that had been raised by a group of women who in 1875 had tried to register to vote: did women enjoy the franchise under the text of the 1833 constitution? Huneus, after conceding that the constitution did not explicitly and conclusively exclude them from the vote, declared that

“la mujer ha estado siempre excluída de toda participación en la organización y en el ejercicio de los Poderes Públicos. Esta exclusión, aunque la Carta Fundamental no la haya escrito en tipo visible, proviene de razones de un orden superior: del que Dios y la Naturaleza han establecido al atribuir á la mujer en la Sociedad, y sobre todo, en la familia, una serie de deberes verdaderamente incompatibles con el ejercicio activo de la Ciudadanía en toda su extensión.”²¹

The 20th century slowly brought some changes. The 1925 constitution recognized a new social and political arrangement and established a normative framework for the regulation of markets and the protection of labor in the context of a protectionist economic policy. Women won the right to vote in the local elections of 1935, had it guaranteed through an amendment to the *Ley General sobre Inscripciones Electorales* enacted in 1949, and exercised it for the first time in presidential elections in 1952. Moreover, in a strictly legalistic sense, the concept of discrimination was incorporated into Chilean law in 1948 by the Universal Declaration of Human Rights through its arts. 7 (right to equality before the law without any discrimination) and 23 (right to equal pay for equal work without any discrimination), and was reinforced in 1969 by the American Convention on Human Rights through its arts. 1.1

history dealing with indigenous rights and land, recently compiled by NÚÑEZ (ed.) (2010), whose analysis exceeds the reach of this paper.

20 ERRÁZURIZ (2005).

21 HUNEUS (1890), vol. 1, 89.

(guarantee of free and full exercise of rights and freedoms without any discrimination for reasons of race, sex, or any other social condition), 17.2 (principle of non-discrimination as a constraint on domestic marital laws), 24 (right to equal protection of the law without discrimination), and 27.1 (principle of non-discrimination as a constraint on the lawfulness of domestic emergency powers).

Under the 1925 constitution, however, Chilean courts had no jurisdiction to enforce international human rights treaties directly. Indeed, it seems safe to say that international law, for the Chilean legal profession between the 1920s and the 1970s, was something closer to the sphere of foreign affairs than to those of legal doctrine or legal practice.²² Furthermore, neither this nor the previous document, the 1833 Constitution, had provided for the judicial protection of any fundamental rights other than freedom from arbitrary arrest. Unlike other courts around the world looking for ways to perform a juridical coup d'état,²³ Chilean courts during the lifetime of the 1925 constitution never tried to reach for its clauses or principles to strengthen their authority or expand their jurisdiction.

These are only some of the many elements that should make us refrain from thinking of Chile as a historical beacon of constitutional governance and respect for the rule of law merely because presidents elected through some kind of election governed the country almost without interruptions between the end of the 1829 civil war and the 1973 coup under the rule of two generally respected constitutions enacted in 1833 and 1925. These con-

22 A significant exception was the new field of labor law scholarship, characterized by a heterogeneous approach to relevant materials. While classic textbooks on civil law such as Luis Claro Solar's *Explicaciones de Derecho Civil Chileno y Comparado*, published in several volumes between 1898 and his death in 1945, employed exegetic and conceptual approaches to explain systematically the meaning of the elegantly written clauses of the Civil Code, textbooks on labor law such as those authored by LUIS BARRIGA and ALFREDO GAETE (1939) or by ALFREDO GAETE and EXEQUIEL FIGUEROA (1946) mixed pragmatically legal and extralegal materials such as historical explanations of the rise of modern capitalism and its workforce, lengthy references to international labor treaties, outlines of sociological approaches to the study of labor, descriptions of minute details of the relevant administrative institutions, analyses of contending economic ideologies, and dry explanations of the clauses of the decrees and legislative enactments that in 1931 had been put together under the rubric of *Código del Trabajo*. Nevertheless, they gave no clue as to how the contents of international labor norms could be invoked in Chilean labor courts.

23 STONE SWEET (2010).

tinuities, however, were bolstered in both centuries by the constant use of military and police violence commanded by presidents against political dissent, social unrest, and territorially peripheral populations, sometimes outside the rule of law but often within the wide authority that the 1833 and 1925 constitutions gave them “a todo cuanto tiene por objeto la conservacion del orden público en el interior, i la seguridad exterior de la República”, as both constitutional texts put it.²⁴ As Loveman and Lira²⁵ have shown, a constant flux of legislative and administrative enactments has, throughout the life of the republic, given shape to a political architecture aimed at preserving the interior security of the Chilean state. Long before the 1973 coup, Chilean presidents enjoyed and often employed wide emergency powers without much control from either Congress or the judiciary, and as Hilbink²⁶ demonstrates, historically, the judiciary had been particularly very weak in its relations with the Executive; presidents often interfered with their decisions, and judges generally deferred to the authority of presidents when they exercised their powers. Chile, in that sense, has been a great example of the repressive regimes of exception employed historically in Latin-American constitutionalism, which Brian Loveman²⁷ described as establishing a “constitution of tyranny”.²⁸

24 As to elections, we must keep in mind that, in the 19th century, they were tightly controlled by the executive; and that fraud and other forms of vote control were widespread, particularly in the countryside, until the enactment in 1958 of a comprehensive reform to electoral procedure. Nevertheless, as PONCE DE LEÓN (2017) rightly points out, elections played an important role in state building, bringing state authorities during the first century of the republic to negotiate with local elites the terms of political order and preparing the ground for the professionalization and bureaucratization of electoral administration in the 20th century.

25 LOVEMAN/LIRA (2002).

26 HILBINK (2007).

27 LOVEMAN (1993).

28 The role of the Presidency has been recognized and glorified by Chilean conservative intellectuals from Alberto Edwards (2001), a reader of Oswald Spengler who argued in the 1920s that the erosion of presidential authority at the end of the 19th century had put in charge of the country a self-indulgent “parliamentarian Fronde” unfit to meet the political challenges and confront the social malaise of the modern world, to BERNARDINO BRAVO LIRA (1996), recipient of the 2010 *Premio Nacional de Historia*, who sees the Presidency as the fundamental continuity between Colonial and Republican times and has vindicated historical exercises of presidential power outside the constitution. If, for Edwards, the man who would solve the secular erosion of authority in Chilean politics and society at large was the dictator Carlos Ibáñez del Campo, that man for Bravo was

The first inclusion of the concept of discrimination in Chilean constitutional norms occurred in 1971 with Law No. 17.398, a constitutional reform that the centrist Christian Democratic Party (PDC) demanded from socialist candidate Salvador Allende in exchange for supporting his congressional ratification as President of the Republic after he won the 1970 election without an absolute majority of the popular vote. The cold-war context instilled in members of this party the fear that the left grouped in *Unidad Popular*, Allende's Marxist coalition, could enact restrictions on social liberties and political rights and led them to view the approval of a constitutional amendment expanding the existing bill of rights as a guarantee against this outcome. Several political and social rights were expanded to express the substantive agreements that progressive Christian Democrats shared with the left; but the wording of some of them was also evidence of the anxieties that moderates and conservatives within the PDC still harbored. It is in this last sense that the concept of discrimination was mentioned in the *Estatuto de Garantías*, in what became art. 10.3 par. 5 of the amended 1925 constitution:

“La importación y comercialización de libros, impresos y revistas serán libres, sin perjuicio de las reglamentaciones y gravámenes que la ley imponga. Se prohíbe discriminar arbitrariamente entre las empresas propietarias de editoriales, diarios, periódicos, revistas, radiodifusoras y estaciones de televisión en lo relativo a venta o suministro en cualquier forma de papel, tinta, maquinaria u otros elementos de trabajo, o respecto de las autorizaciones o permisos que fueren necesarios para efectuar tales adquisiciones, dentro o fuera del país.”

The report sent to Congress by the joint committee of Christian Democrats and *Unidad Popular* stated that “la prohibición de discriminar arbitrariamente que se establece” in that article would also apply to the guarantees that state authorities had to grant in certain cases for the acquisition on credit of machinery, tools and equipment. The fear that some wanted to placate with this amendment was that Allende would start putting in place administrative restrictions to the exercise of the free press. To make things more complicated politically, shortly after his inauguration, Allende gave an interview in which he described the *Estatuto* as a “necesidad táctica”, an expression that was quickly spun by the conservative press to present Allende

Augusto Pinochet Ugarte. BRAVO LIRA (2016) has gone on to assert that authoritarian presidentialism has saved Chile from decay and poverty two times, first after the dissolution of the Spanish empire, then when it was almost drawn into the orbit of the Soviet empire during the *Unidad Popular* years.

as a trickster who was determined after taking power to violate the same rights he had sworn to uphold. This was the beginning of a campaign from the conservative media, the right and some in the Christian Democratic party to present the left as dangerous and treacherous, an image that later on was crucial in constructing the discourse that the Military Junta invoked to justify repression and to claim support for its projects, particularly for the 1980 constitution. Allende and the left were portrayed as enemies of democracy who had sought to destroy it from within; one of the most important roles that the new constitution had to play was to establish a “democracia protegida” that could count on strong powers to defend itself against any “enemigos internos”.

The first conceptual appearance of the notion of discrimination in Chilean constitutional documents was formed in a moment of political distrust toward the socialism that was on the verge of gaining the presidential office. Its expansion took place through the 1980 constitution, which was itself the result of a political reaction materialized through a coup against the socialist exercise of the wide legal powers held by the presidency. Lacking congressional majorities to enact new legislation for implementing his program of creating a socialist economy, Allende took over hundreds of companies invoking the ample seizure powers granted by Law Decree No. 520, a decree enacted during a short *de facto* government in 1932, and invoked the *Ley de Seguridad Interior del Estado* to stop courts from expelling *pobladores* and peasants from illegal *tomas*. These practices were labeled “resquicios legales” by the opposition, who accused Allende of riding roughshod over the separation of powers and violating the constitution through them. Adding to this, an institutional deadlock over a constitutional amendment backed by the Christian Democrats embroiled the President in a series of conflicts with Congress, the Constitutional Tribunal, and the Controller-General. In August 1973, the Lower House passed a resolution accusing the president of violating the constitution, and, on September 11, 1973, the Military Junta employed the same arguments to justify the coup.

Employing the *resquicios legales* and other actions of Allende presented as breaches to the rule of law as rhetorical devices to legitimize its exercise of the constituent power, the Military Junta and its civil supporters promoted a constitutional project that would serve, as Barros²⁹ has shown, not as a

29 BARROS (2002).

limitation to its power but as the institutional framework to consolidate it and to project its ideological program. This is evident in the way that the constitutional text employs the concept of discrimination to articulate fundamental neoliberal principles.

Art. 19.16 proclaims the “libertad de trabajo y su protección” – a diluted version of what other constitutions conceive as the right to work – and bans in its par. 3 “cualquiera discriminación que no se base en la capacidad o idoneidad personal”, enabling legislation to establish Chilean nationality or age limits as requirements in certain cases. This wording does not attribute to the notion of discrimination itself a prejudicial character, focusing only on prohibiting those differences that can be characterized as arbitrary to the extent that they are not based on individual capacities and skills. While it cannot be denied that this article puts forward a technical legal concept of discrimination, it remains open to discussion whether this formulation accounts for the social phenomenon that sociopolitical vocabulary calls by that name.

In the two decades that followed the enactment of the 1980 constitution, however, the ban on arbitrary discrimination in the workplace remained as a ‘dormant’ constitutional clause. It was only in 2001 that a reform to the Labor Law Code gave effective applicability to the principle of non-discrimination in labor relations. It redefined discrimination, for the sole purposes of labor law, as any “distinciones, exclusiones o preferencias basadas en motivos de raza, color, sexo, edad, estado civil, sindicación, religión, opinión política, nacionalidad, ascendencia nacional u origen social, que tengan por objeto anular o alterar la igualdad de oportunidades o de trato en el empleo y la ocupación” and assigned labor-law judges jurisdiction over these cases through a new judicial remedy for the protection of fundamental rights in the workplace, the so-called *recurso de tutela laboral*. The *tutela laboral* is until today, even after the creation in 2012 of a judicial remedy against discrimination, the most effective judicial remedy for the protection of rights in the Chilean judicial procedure system.

Art. 19.22 establishes the principle of “no discriminación arbitraria en el trato que deben dar el Estado y sus organismos en materia económica”, the right of not being arbitrarily discriminated against by the state in economic matters. To protect this fundamental right even further, among the many laws that the Junta enacted in its last day of government in 1990, there was a new judicial remedy, the *recurso de amparo económico*. This right has never

been understood in Chilean constitutional practice and doctrine as something different from the protection of market freedom. In theory, one could say that the state discriminates economically against those who have no guaranteed job or source of income, but that kind of conceptual creativity has not characterized the interpretation of this right. Art. 19.22, in connection with the directive in art. 98, which forbids the Central Bank from making decisions that directly or indirectly establish “normas o requisitos diferentes o discriminatorios en relación a personas, instituciones o entidades que realicen operaciones de la misma naturaleza”, codifies within constitutional document the historical subjectivity of the conservative propertied classes under the *Unidad Popular* as a prohibition against interventions of the state in the economic field considered, in Hayekian vein, as too disruptive of the spontaneous market order.

These new concepts were introduced in the constitution by the lawyers who prepared for the Military Junta a preliminary draft of the new constitution, the members of the *Comisión de Estudios de la Nueva Constitución* (CENC), who began working right after the coup on September 1973. CENC members included its chair, Enrique Ortúzar, a former minister of justice under conservative president Jorge Alessandri; Enrique Evans, a former undersecretary of justice in the administration of Christian Democrat president Eduardo Frei; Alejandro Silva, the Christian Democrat president of the Bar Association who had published in 1963 a *Tratado de Derecho Constitucional*; a former congressman from the Conservative party; two lawyers close to the armed forces; and a young activist and professor of constitutional law named Jaime Guzmán, who would later be identified as the main political intellect behind the long-term neoliberal project of the regime (CRISTÍ 2000). In their circumscribed heterogeneity, they were representative of the ideological sensibilities that had opposed the Allende government, and, with the departure of PDC members Evans and Silva in 1977 in protest for the official illegalization of that party and their replacement with Opus Dei member Raúl Bertelsen, the composition of the CENC reflected the political shifts in the regime.

The transcripts of the CENC meetings have been considered by constitutional judges and scholars as an authoritative source in interpreting the constitutional text since Pinochet declared them “material de consulta” by decree in March 1983. Nevertheless, the best guarantee for the continuity of the ‘original’ intent of constitutional clauses, of the understanding that the

jurists who assisted the dictatorship assigned to the text to the writing of which they had contributed, was that those same jurists remained powerful and influential after the demise of the dictatorship.

The CENC transcripts show that its members believed that the protection of private property and economic and social freedoms was the justification for a coup that they saw as a legitimate exercise of the right to rebel as outlined in the Thomistic tradition of natural law. The novel conceptual vocabulary that they introduced in the constitutional text,³⁰ which referred to *personas* instead of *habitantes del territorio* or *ciudadanos* as the holders of constitutional rights, declared in its art. 1 that families are the “núcleo fundamental de la sociedad”, and that invoked the “bien común” as the ultimate purpose of the state, drawing heavily from the modern understanding of the Thomistic tradition elaborated by the social teaching of the Church. In this way, natural law was instituted as a significant source of contemporary Chilean constitutional law.³¹

In what ways did these ideological coordinates affect the reception of the concept of discrimination in Chilean constitutional law? In the 1980 constitution, the traditional declaration guaranteeing the “igualdad ante la ley” was complemented with a new paragraph stating the following: “Ni la ley ni autoridad alguna podrán establecer diferencias arbitrarias.” This textual innovation has been interpreted in Chilean constitutional law as establishing the concept of “discriminación arbitraria” as a kind of private or public behavior that is the object of a constitutional prohibition. The content of this ban has been understood throughout the decades in a remarkably originalist way, invoking as the normatively correct way to interpret it the understanding that the persons who had the idea of writing down this sentence had about it. The origins of this clause can be found in the 93rd session of the CENC, held on December 5, 1974.³² In that session, Alejandro Silva suggested that

30 This was not the only new conceptual vocabulary that CENC members introduced into the constitution; others included the jargon spread by the United States through the School of the Americas, which was obsessed with “seguridad nacional”, and the neoliberal lingo that employed words such as “actividades empresariales”.

31 Muñoz (2014).

32 That same day, while Pinochet’s secret police still kidnapped people in broad daylight in the center of Santiago and threw tortured bodies into the Mapocho River, CENC chairman Enrique Ortúzar said that they were having a “very interesting debate about all the implications of consecrating the right to life in the Constitution” (which was in the end

the right to equality could be understood in two different forms: as banning any distinction between persons based on a “motivo sociológico” such as their “raza, sexo, estirpe, u otras condiciones”, a sense that he observed: “se ha sostenido clásicamente”; but also in another sense that seemed to excite him more as he saw it: “comprendido sustancialmente en el principio básico de la igualdad ante la ley”, and that meant that “el constituyente tiene que asegurar que, incluso, sobre la base de respetarla en el primer sentido, ninguna autoridad, ni siquiera el legislador, haga distinciones o discriminaciones manifiesta y notoriamente arbitrarias”.

The echoes of the *resquicios legales* could still be heard reverberating in Silva’s evident preoccupation with the arbitrariness of the state, but behind his lingering trauma with economic statism lay a deeper concern. If, for Silva, a devout Catholic, even the holder of constituent power, “el constituyente”, had to refrain from making “discriminaciones arbitrarias”, that was possible because he believed in the existence of an objective preconstitutional criterion for determining the arbitrariness or the reasonableness of constitutional norms: nature as revealed through religious doctrine and time-proven tradition. This becomes evident when Silva was asked by other CENC members the question of how the ban on “discriminaciones arbitrarias” would affect the inequality between men and women characteristic of Chilean family law, which, as Salinas has demonstrated, was little more than a transplant of canon law on marriage into Chilean legal texts.³³ Silva answered that what the constitution was prohibiting was distinctions that were not based on nature; in his words, “lo grave es hacer distinciones que no estén basadas en la naturaleza, es decir, que el legislador inspire y concrete distinciones entre el hombre y la mujer o cree situaciones o las favorezca que produzcan diferencias entre el hombre y la mujer que no estén basadas en la naturaleza, sino en un concepto equivocado sobre la igualdad de derechos entre ambos”. “Eso”, concluded, “sería arbitrario”. Guzmán seconded him in

included as art. 19.1 of the 1980 constitution, displacing “la igualdad ante la ley” from its previous position as the first right enumerated in the bill of rights in the 1833 and 1925 constitutions) and affirmed with emotion that “everyone knows, especially those who have read Solzenitzin, how torture or psychic torments are often used against human beings”. Ortúzar seemed oblivious to the fact that the same government that appointed him as its constitutional advisor had at its service a considerable number of experts in murder and torture.

33 SALINAS (2004).

defending the unequal legal structure of traditional marriage stating that “es evidente que la cabeza de la familia debe ser el hombre, el padre o el marido”. To clarify his point, in the following session, Silva opposed the proposal of some CENC members to establish in the constitution that men and women had equal rights, characterizing this proposal as “demagógica”, since “no es efectivo que sean iguales los derechos del hombre y de la mujer, porque la naturaleza no los ha hecho iguales a ambos”.³⁴ Clarifying the constitutional meaning of equality with respect to women, Evans concluded that any differentiation affecting them that “no se funda en una distinción derivada de la naturaleza propia del hombre y de la mujer ni en la naturaleza propia de la institución de la familia” would be a case of arbitrary discrimination.

It is hard not to conclude that, by adjectivizing the idea of discrimination with the notion of arbitrariness, Silva sought to ban through the constitution only extreme forms of racial hatred or misogyny that would have offended the sensibilities of an upper-class Chilean, not features of the social structure that he would have taken as given. That Silva had difficulty imagining cases of discrimination that actually existed around him is revealed by the example that he gave of what would count as arbitrary discrimination: the hypothetical case of a legislative enactment providing for the retirement of private employees with only 35 years of service in the case of those whose last names began with the letters from A to M and with 40 years of service in the case of those whose last names began with letters M through Z. However, when asked whether the legislator could establish different retirement ages for public and private employees, Silva responded that he saw that as a differentiated treatment for different situations and hence acceptable within the margins of flexibility enjoyed by the authority.

In sum, CENC members put forward an understanding of the concept of discrimination that emphasized the element of arbitrariness, a conceptual cognate of irrationality rather than one of structural disadvantage. This emphasis has been followed by most courts and authors in the decades since the enactment of the constitution. Despite the well-known open-ended character of constitutional clauses and their resulting semantic and political

34 This was, in the end, included in the constitution in 1999 through a short amendment, boastfully called “Establece Igualdad Jurídica entre Hombres y Mujeres”, which replaced the expression “Los hombres” with “Las personas” in art.1 and added to art.19.1 the phrase “Hombres y mujeres son iguales ante la ley”.

malleability, in the case of the Chilean constitutional discourse enunciated from positions of academic and judicial authority, the concept of discrimination is still interpreted predominantly through understandings established during the military dictatorship.

4 The concept of discrimination and judicial decisions on sexual diversity in postdictatorial Chile

Widespread prejudice against all expressions of sexual and gender diversity has a long history in Chile, finding its roots in the cultural, religious, and legal traditions coming from the Spanish colonization. Continued prevalence of those prejudices during the 19th century found expression in art.365 of the 1875 Penal Code, which declared that “[e]l que se hiciere reo del delito de sodomía sufrirá la pena de presidio menor en su grado medio”. The concept of “sodomía” was not defined by the legislator, and its precise meaning was therefore contested among criminal law courts and scholar.³⁵

Although the diversification of urban life in the mid-20th century allowed the emergence of clandestine spaces of gay, lesbian and trans socialization in various social spaces and classes, the prejudices that continued to prevail in public culture prevented these segments of the population from obtaining political recognition and legal protection against the discrimination and violence of which they were systematically victims.³⁶ During the *Unidad Popular*, when various forms of rebellion shook the traditionalism of Chilean society, there took place the first public demonstration of gay people, on April 22, 1973. The timing of this event should not be confused with support for this struggle from the left, whose media used derogatory and mocking terms to refer to this demonstration.³⁷ It was under Allende that art. 365 of the Penal Code was amended to punish more severely the act of “sodomía” when one of the parties raped the other or when one of them was a minor.

The first visible actors to vindicate sexual diversity through discourses that challenged traditionalist beliefs and conservative politics emerged during the last years of the dictatorship, in the second half of the 80s, when the self-

35 BASCUÑÁN et al. (2011) 76.

36 CONTARDO (2017).

37 ACEVEDO/ELGUETA (2009).

described “colectiva lésbica” *Ayuquelén* and the gay duo known as *Las Yeguas del Apocalipsis* published manifestos and carried out artistic-political interventions questioning not only the murderous violence of the dictatorship but also the indifference of the Chilean left to the discrimination that sexual minorities and gender non-conformists experienced. One of *Las Yeguas*, Pedro Lemebel, who later became a renowned chronicler of marginality and social and sexual dissidence, read in 1986 at a leftist function his text *Manifiesto (Hablo por mi diferencia)*, where he provokes his supposedly progressive listeners in this way: “Yo no voy a cambiar por el marxismo / que me rechazó tantas veces / No necesito cambiar / Soy más subversivo que usted.”³⁸

During the last years of the 1980s and the first years of the 1990s, when the country was seemingly fixated on the possibilities of a pacted transition and oblivious to its costs, AIDS had become for the gay population a health threat and a source of renewed prejudice and discrimination. To face these challenges, in 1991 a group of gay activists founded the first Chilean gay rights organization, the *Movimiento de Liberación Homosexual*;³⁹ since then, various LGBT organizations have been created both to assist individuals in trouble and to represent the interests of the sexually diverse community before the authorities.

In the last decade, it has become evident that the new generations of Chileans, increasingly less religious and more connected through the media to global cultural changes, show not only a greater acceptance but also a growing appreciation of sexual diversity. Social and cultural change has given greater visibility to diverse and non-conformist gender and sexual expressions, as well as to the acts of violence that still threaten individuals who exercise their autonomy in these fields. Despite the resistance still entrenched in certain groups, an authentic “sexually diverse citizenship”⁴⁰ has emerged gradually in Chile, expressive of both the growing political agency of LGBT organizations and actors and the tendency to grant sexual diversity stronger legal protections, a tendency to date expressed in the enactment of a statute against discrimination in 2012, the creation of the civil union pact for same-sex couples in 2015, and the enactment of a gender identity statute in 2018. Only evangelical churches, the Catholic Church and

38 LEMEBEL (2011).

39 ROBLES (2008).

40 MUÑOZ (2018).

its conservative intellectuals in Catholic universities, and the traditionalist elements of the political right have shown open antagonism against the strengthening of this sexually diverse citizenship, opposing each and every one of the legislative proposals that today make up the package of rights of sexually diverse citizens and making effort to mobilize religious beliefs to affect secular law – an example of what has been called “religious citizenship”.⁴¹

A significant milestone in the progress of sexually diverse citizenship was the amendment to art. 365 that in 1999 decriminalized sexual relations between adults of the same sex. This amendment, however, left intact the criminalization of sexual relations – defined as “acceso carnal” – between an adult and a minor over the age of consent.⁴² During the discussion of this legal reform, congressman Iván Moreira, a staunch Pinochet devotee, defended the ban, arguing that, although in practice it did not lead to arrests or convictions, it was important to keep it as a sign that legislators and society at large were not indifferent to this threat to social values. Moreira warned that the abolition of the criminal ban represented the first step in a series of demands that would soon include the legalization of marriages between couples of the same sex and their right to adopt children and educate them. Moreira, in this sense, was not wrong.

Courts have indeed had the opportunity to express their views on those demands. In 2004, the Supreme Court resolved a family dispute arguing that the protection of the best interest of minors demanded that Karen Atala, a lesbian mother of two, be deprived of the guardianship of her daughters in order to protect them from the prejudices existing in Chilean society against lesbianism. The *Atala* case has become well known because, after being decided by the Chilean Supreme Court, it landed in the Inter-American Court of Human Rights, becoming its first landmark case on sexual diversity rights. As justification for its decision, the Supreme Court wrote a short opinion which presented in stark terms the psychosocial dangers created by the family structure provided by the mother and her lesbian partner. It

41 VAGGIONE (2017).

42 In 2011, the Constitutional Tribunal declared that, since homosexual relations presented risks to minors of consenting age, it was constitutionally permissible to punish those adults who engaged in consensual sexual relations with them.

blamed Atala for neglecting her maternal role in order to pursue her sexual desires:

“la madre de las menores de autos, al tomar la decisión de explicitar su condición homosexual, como puede hacerlo libremente toda persona en el ámbito de sus derechos personalísimos en el género sexual, sin merecer por ello reprobación o reproche jurídico alguno, ha antepuesto sus propios intereses, postergando los de sus hijas, especialmente al iniciar una convivencia con su pareja homosexual en el mismo hogar en que lleva a efecto la crianza y cuidado de sus hijas separadamente del padre de ésta.”

The judges decided to deny Atala custody of her children arguing that, practically as a matter of definition, a same-sex couple could never provide a proper setting for raising children:

“aparte de los efectos que esa convivencia puede causar en el bienestar y desarrollo psíquico y emocional de las hijas, atendida sus edades, la eventual confusión de roles sexuales que puede producirse por la carencia en el hogar de un padre de sexo masculino y su reemplazo por otra persona del género femenino, configura una situación de riesgo para el desarrollo integral de las menores respecto de la cual deben ser protegidas.”

It is a judgment that turns the reasoning of *Brown v. Board of Education* upside down. Unlike its counterpart, the Chilean Supreme Court preferred to be deferential to social prejudices instead of trying to change the structures and practices that embody and reproduce them.

Another important case in this sense was heard in 2011, when a substantial majority on the Constitutional Tribunal declined to declare unconstitutional the definition of marriage as the union between a man and a woman contained in art. 102 of the Civil Code, ruling that the constitution does not guarantee same-sex couples a right to marry. Only one judge considered the Code unconstitutional, while all nine of his colleagues voted jointly to reject its unconstitutionality, stating that the legal configuration of marriage was the competence of the legislator. Those nine judges, in turn, were divided into a majority of five moderate judges who concurred in inviting the legislator to create a legal alternative for same-sex couples, and a minority of four conservative judges who expressed their opposition, affirming that marriage is intrinsically heterosexual, since only couples composed of a male and a female enjoy a reproductive complementarity that is missing in couples composed of individuals of the same sex. For example, Raúl Bertelsen, the Opus Dei member of the CENC who had become a member of the Tribunal and would go on to become its president, wrote in his concurring opinion

that establishing procreation in art. 102 of the Civil Code as a fundamental purpose of marriage was consistent with “la importancia social del matrimonio” and that it was reasonable “que la ley reserve su celebración únicamente a personas de distinto sexo ya que sólo la unión carnal entre ellas es la que, naturalmente, puede producir la procreación, y excluya de su celebración a personas del mismo sexo”. In his view, the reproductive complementarity between biologically different sexes provided sufficient justification for concluding that the differential treatment given by the legislator to heterosexual and same-sex couples did not amount to a discriminatory difference under art. 19.2.

The concept of discrimination, in sum, has practically played no role in significant judicial decisions on the rights of gay and lesbian people issued by the two highest Chilean courts in postdictatorial times. Law 20.609, the Antidiscrimination Statute that came into force in 2012, was supposed to solve these problems, but, as several scholars have noted, the Statute itself is plagued with shortcomings. It does not satisfy international standards for human-rights protection; its wording does not appear to offer protection against discriminatory acts as such but only against discriminatory acts that impinge on another constitutional right; and it does not create an administrative authority with the adequate powers to enforce it. It does not award damages to victims of discrimination, but rather it punishes them with the payment of a fine if they cannot prove they have, in fact, been discriminated against, and it does not instruct judges to shift the onus of proof from the plaintiff to the defendant, nor does it instruct them to examine the arguments with a stricter level of scrutiny. *Movimiento de Inclusión y Liberación Homosexual*, an LGBT rights organization that took part in the legislative discussion on the statute, has criticized the results of this Statute and has continuously called for its reform.

The blame for the unsatisfactory results stemming from the Antidiscrimination Statute, however, should not be attributed exclusively to the executive and to legislators. Judges, through their interpretation, have predominantly given the Statute a restrictive reading. This is largely due to the prevalence among them of a formalist understanding of the concept of arbitrary discrimination, which restricts it to ‘irrational’ and ‘capricious’ behavior, ‘ungoverned by reason’, and that lacks any justification whatsoever. This narrow understanding of the constitutional concept of arbitrary discrimination, which draws on the understanding of arbitrary discrimination that

characterized the CENC debates, was consolidated in the 1990s by the Supreme Court and has been used explicitly by judges to interpret the Antidiscrimination Statute. In light of this conceptualization of discrimination, it is not surprising that most rulings on cases brought under the Antidiscrimination Statute have found without much discussion that there was no discrimination. Another frequent conclusion reached by many judges was that the plaintiff had not sufficiently proved the alleged facts or their discriminatory character. These decisions show that judges have often applied a strict standard of proof and justification in evaluating claims of discrimination made by plaintiffs instead of using flexible standards of proof and scrutinizing the evidence and the arguments offered by defendants closely.⁴³ Unsurprisingly, in the very few cases when judges applied strict scrutiny to the normative and factual allegations of the defendants, they tended to side with the plaintiffs. Judges, as can then be seen, also bear a not inconsiderable share of responsibility when it comes to the shortcomings of the Antidiscrimination Statute.

5 Concluding remarks

Let me conclude with two brief reflections. The phenomenon of discrimination, owing to its complexity but more fundamentally to the particular human experiences that are summarized through this concept, requires a pluralistic approach. While employing constitutional documents to approach the conceptual history of discrimination can shed light on only a part of the whole story, i.e., on discourses that make use of positions of power and influence; undoubtedly, in order to gain a broader perspective of the reality under study, there are other voices that must be included. Approaches to history from below can complement this focus on institutions and on discourses from power with a concern over the use of fundamental sociopolitical concepts in everyday conversations and personal storytelling.

Last but not least, dealing with a concept such as discrimination makes evident the challenge of bringing to light the influence of power relations on the historical existence of legal institutions. From the point of view of legal doctrines, what is needed a specific system of knowledge, concepts, and words that express abstract ideas that can be employed in legal reasoning

43 Muñoz (2015).

in order to guide conduct in accordance with legality. Legal doctrine, for that reason, tends to have an idealized vision of its own concepts, which it sees as analytical instruments for the rationalization of fundamental values. However, as Reva Siegel has shown regarding American constitutional praxis, even a matter apparently as pristine as the content of the constitutional principle that prohibits discrimination is ultimately the product of political disputes over its interpretation and application even when it is invoked to claim, express and channel social concerns openly opposed or divergent among themselves.⁴⁴ Histories of legal doctrines must make visible the points where sociopolitical conflicts penetrate the autonomy of legal reasoning in order to expose these interactions between social reality and legal knowledge.

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The Different Meanings of Discrimination from a Czech Perspective

1 Introduction

It was a pleasure to read Fernando Muñoz's excellent paper¹ on the constitutional history of the concept of discrimination in Chile. In this comment, I offer a comparison with the development in a Central European country, Czechia, which also experienced an authoritarian period in the 20th century, albeit of the ideologically opposite type, state socialism. Most of my work has so far focused on sex/gender equality and so it is largely on this topic that my analytical points are presented here. In section 2, I provide relevant quotes from all the Czech 20th-century constitutions with brief commentary. This is followed by two analytical sections which, drawing on the Czech experience, suggest lenses possibly helpful for wider analysis of equality and anti-discrimination law. Section 3 presents the – very different – trajectory that equality and anti-discrimination law has had in Czechia, where a substantive, transformative equality project centred around class preceded the introduction of individual anti-discrimination protections. This has led to certain legacies that are less at the surface level of regulation and more in the underpinning ideas and concepts, which have weakened the new anti-discrimination guarantees. Section 4 presents the distinction between what I have termed elsewhere² the general principle of equality, which is often complemented by a prohibition of *discrimination simplex* (no-ground discrimination), on one hand, and anti-discrimination law relating to grounds such as race or sex on the other. I note that the former is the pre-eminent concept, more frequently and readily used by applicants and applied by the courts. The protection from specific, ground-related discrimination, by comparison, has been flagging. This is perhaps because a genuine understanding of the normative reasons for the singling out of these grounds is missing.

1 In this volume.

2 HAVELKOVÁ (2020).

A short methodological note is called for. While my work has looked at past developments, it has always been with a view to understand the current situation of equality and anti-discrimination law in Czechia. It is therefore more ‘genealogical’ than ‘historical’. Connectedly, rather than looking merely at how terms such as ‘equality’, ‘discrimination’ (or ‘diversity’) are used in primary sources, i. e. when referenced explicitly, in my work, I have aimed to understand the conceptual underpinnings of a wider range of legal regulation and case law, which can be understood as affecting the status of women and their equality in society (such as special treatment of women in labour law, prostitution, or abortion rights). This kind of hindsight (classifying an issue as an equality issue even when it might not have been seen as such historically) has advantages as well as disadvantages. The dangers are at least twofold: 1) it can be ‘ahistorical’, meaning that it does not correspond to past understandings, but rather imposes more current ones; and 2) it can be more removed from primary sources than the author’s and many others’ in this volume, as my analytical points are tied to my interpretation. The positives, on the other hand, could be 1) that it can identify ‘silences’ and gaps in the past; and 2) it may perhaps allow for a more critical rather than descriptive work, and so it is from this perspective that the following observations are written.

Finally, it is worth noting that the following comment is briefer than I had hoped. The deadline for the submission of the final draft coincided with the COVID-19 pandemic lockdown. For me, as for many primary carers – who are mostly women – this meant switching to full-time childcare in the home, alongside attempts to continue working in home-office conditions. It might be surprising that I raise this issue in my academic writing, but, since this is a symposium on equality and discrimination, I consider it highly relevant. By not being silent about the difficulties of reconciliation of family and work life during this time, which has led to a considerable drop-off in productivity especially among female academics, I hope to contribute to knowledge and the acknowledgment of this issue by the wider academic community.

2 Legal development

In this section, I provide the relevant equality and anti-discrimination provisions from the four Czech constitutions of the 20th century (1920,³ 1948,⁴ 1960,⁵ and 1993⁶) with very brief commentary.

The 1920 Czech Constitutional Charter abolished male, occupational and aristocratic privileges. It also effectively prohibited discrimination (although the word is not used) based on certain characteristics: namely, origin, nationality, language, race, or religion (these, unsurprisingly, correlated to minorities, including the Germans in the Sudetenland, which formed part of the territory of the newly created country of Czechoslovakia):

“Sec 106 (1): Privileges due to sex, birth or occupation shall not be recognized.

(2) All persons residing in the Czechoslovak Republic shall enjoy within its territory in equality measure with the citizens of this Republic complete and absolute security of life and liberty without regard to origin, nationality, language, race or religion. Exceptions to this principle may be made only so far as is compatible with international law.”⁷

Similar to many other countries, including Chile and Germany which are analysed here, this provision was viewed as compatible with a different status of men and women in the family.⁸

The equality guarantees were then affirmed and expanded by both state socialist constitutions in 1948 and 1960. The 1948 Constitution, in the very first paragraph of its section listing “Rights and Obligations of Citizens”, stated that “[a]ll citizens are equal before the law.”⁹ This was immediately followed by a seemingly wide and profound guarantee of equality between the sexes:

3 Act No. 121/1920 Coll., Introducing the Constitutional Charter of the Czechoslovak Republic.

4 Constitutional Act No. 150/1948 Coll, hereafter 1948 Constitution.

5 Constitutional Act No. 100/1960 Coll, hereafter 1960 Constitution.

6 Act No. 2/1993 Coll., Charter of Fundamental Rights and Basic Freedoms.

7 I am using the translation available at: <https://archive.org/details/cu31924014118222/page/n45/mode/2up>.

8 Indeed, the 1920 Constitutional Charter itself contained a special provision on “Marriage and Family” which put “[w]edlock, family and motherhood” under “special protection of the law”. (§ 126). For a discussion, see FEINBERG (2006).

9 Sec 1 (1) 1948 Constitution.

“Men and women have equal standing in family and in society and equal access to education and also to all occupations, offices and ranks.”¹⁰

As I have argued elsewhere,¹¹ while family law was relatively quickly reformed to fulfil this promise, the family remained a place of de facto inequality throughout the state socialist period, often facilitated by provisions in other areas of law (any childcare leave from work was only available to women, for example).

The 1960 Constitution expanded the treatment of equality. In addition to a general provision guaranteeing “equal rights and equal obligations” to all citizens,¹² protecting them from nationality and race discrimination (again without using the word discrimination), it contained an explicit proclamation of the equal status of men and women, including in the family, as well as a positive obligation to create equal possibilities and equal opportunities in public life:

“Art 20 (2) The equality of all citizens without regard to nationality and race shall be guaranteed.

(3) Men and women shall have equal status in the family, at work and in public activity.

(4) The society of the working people shall ensure the equality of all citizens by creating equal possibilities and equal opportunities in all fields of public life.”¹³

This positive obligation was further emphasised in relation to women, as the 1960 Constitution went beyond a *de iure* guarantee of equality of the sexes. Not only did it address their special needs (which found expression in often quite limiting protective legislation), but it also mandated proactive measures to ensure women’s participation.

“Art. 27 The equal status of women in the family, at work and in public life shall be secured by special adjustment of working conditions and special health care during pregnancy and maternity, as well as by the *development of facilities and services which will enable women fully to participate in the life of society*.”¹⁴

10 Sec. 1 (2) 1948 Constitution. As before, the 1948 Constitution put “marriage, family and motherhood [...] under the protection of the state.” Sec. 10 (1) 1948 Constitution.

11 HAVELKOVÁ (2017) esp. 27–62.

12 Art 20 (1).

13 Art 20 (2). The following English translations of the 1960 Constitution are taken from: <https://www.worldstatesmen.org/Czechoslovakia-Const1960.pdf>.

14 Art. 27 Constitutional Act No 100/1960 Coll, emphasis mine.

In reality, the 1960s were a period in which these rights were challenged (partly because the previous collectivisation of child care had proved expensive), and during which the earlier emphasis on emancipation of women faded.

The post-state-socialist 1993 Charter of Fundamental Rights and Freedoms¹⁵ comprises a general equality guarantee, as well as a specific provision which contains an extended list of specific grounds (again without the word discrimination).

“Article 1 All people are free and equal in their dignity and rights. [...]

Article 3 (1) Everyone is guaranteed the enjoyment of his fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.”

3 Trajectories

Like Chile and other Latin-American countries, Czechia, and other Central and Eastern-European (‘CEE’) countries, experienced a radical transformation from an authoritarian to a democratic regime in the second half of the 20th century. The main difference is, of course, the type of regime from which these countries transitioned. In the case of Chile, it was from a right-wing dictatorship, and, in the case of Czechia, from a Communist-Party-led state socialist regime. This raises the question of what impact these histories have on these respective countries’ understanding of equality and discrimination.

In Czechia, post-socialist legislators and judges have resisted equality and anti-discrimination law.¹⁶ As I have argued elsewhere,¹⁷ these negative attitudes can be in part explained by the specific trajectory that equality and anti-discrimination law has taken in CEE during (1948–1989) and after (1989–today) state socialism. This trajectory is different not just from Chile,

15 https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf.

16 For an analysis, using the example of sex/gender, see HAVELKOVÁ (2017).

17 The following analysis is taken, in some cases verbatim, from HAVELKOVÁ (2016) 627. Considering this is a discussion comment rather than an independent paper, I allow myself this liberty.

but from the EU and other EU countries, as well as many common law countries (the originators of discrimination law, as the main paper in this section shows).

The development of sex equality and anti-discrimination law in the UK, for example, has been divided¹⁸ into three phases: (1) the elimination of men's legal privilege, (2) the adoption of anti-discrimination legislation, and (3) the rise of substantive and transformative equality, such as affirmative action. The first stage was the same in the UK, in Czechia, as well as, it seems, in Chile, but the development between 'the West' and CEE then diverges from that point onward. In Czechia, the last two stages of equality happened in reverse.

There was first, under state socialism, a transformative project of socio-economic levelling aimed at substantive equality of results, whereas anti-discriminations rights were only introduced later. Because the transformative stage preceded an understanding of discrimination, its characteristics differ from the 'transformative equality' project elsewhere. During the state socialist period, the transformative public policy project did not require the creation of horizontal obligations partly because it happened under state socialism, when most of the types of private relations typically covered by anti-discrimination, such as employment, were effectively non-existent. Conceptually more importantly, it thus lacked an understanding and acceptance that law might need to interfere with deeply held prejudices, even among individuals (who, as employers or service providers, are duty-bearers under statutory anti-discrimination law).

As for the transformative project of the socialist state, its concern with equality was real, and yet the project was incomplete in several significant ways. It saw only socio-economic inequalities, but, with regard to specifically protected grounds including gender but also race, not socio-cultural ones (related to dignity, identity, or diversity). It was therefore transformative with regard to class, but not truly for other discrimination grounds. As mentioned above, while equality was a constitutionally enshrined principle,

18 I draw mainly on HEPPLÉ (2009) 129–164: Writing about labour law in Western Europe, he describes three phases of equality: (1) Formal, in 1957–1975; (2) substantive, in 1976–1999; and (3) comprehensive or transformative, in 2000–2004. FREDMAN (2001) similarly identifies a “new generation” of equality rights, starting in the 2000s, which includes the positive duty to promote equality.

there was an absence of any corresponding enforceable anti-discrimination right. Moreover, for sex/gender specifically, the emphasis on the ‘natural’ differences between the sexes meant that sex/gender discrimination was not recognised as conflicting with women’s constitutional equality guarantees.

While the use of ‘nature’ as a concept and a guarantee to deny women the full use of equality is echoed in the author’s article, the Chilean trajectory is otherwise very different in phases 2) and 3). The neo-liberal use of equality – equality that effectively serves the already advantaged – is especially striking.

What legacies arise from these different trajectories? Of importance are both, the ‘surface’ level of legal regulation, as well as the underlying ideas and concepts.¹⁹ At each level, there have been continuities and discontinuities, both often acting to the detriment of equality and anti-discrimination law. One crucial continuity is that of gaps. In post-socialist CEE, equality and anti-discrimination law has been weakened by the fact that anti-discrimination rights have no indigenous history to draw upon – state socialism knew neither enforceable individual rights, nor their horizontal enforcement. Substantive and transformative equality, therefore, does not have fertile domestic conceptual ground within which to grow in relation to any protected characteristics other than class or socio-economic status. A discontinuity is the widespread, strongly neo-liberal narrative, which connects any equality project with the state socialist past (often misunderstanding or misrepresenting the extent to which equality was both aimed for and actually achieved) and then rejects it, as it does other value-based projects.

Equality and anti-discrimination law thus appears to have been doubly disadvantaged in post-socialist CEE – both by mostly unconscious retention of gaps in regulation and understanding retained from state socialism, as well as by a reactive conscious rejection of certain aspects of the state socialist project. It seems that the historical Chilean understanding of equality, focused on protecting economic privileges, might also be a ‘false friend’ to the more current anti-discrimination law project. This brings me to the last point regarding specific grounds.

19 I have previously made similar points, and borrow some formulations from HAVELKOVÁ (2017) 304–307.

4 Grounds

The legal addition of specifically protected grounds, chosen because they identify deeply entrenched axes of disadvantage, is a recent phenomenon in both Czechia and Chile. Has their legal recognition brought about a genuine understanding of the normative reasons for such singling out? For Czechia, I would argue that such an understanding is still lacking.

In my recent paper on Czech equality and anti-discrimination law,²⁰ I explored a distinction which I suspect might be a useful lens through which to analyse the Chilean example as well, namely that of distinguishing the general principle of equality (and *discrimination simplex*) from ground-related anti-discrimination law. I argued that the general principle of equality is the pre-eminent doctrine in Czechia. There, as in many other civil law countries – and, as it seems to me, in Chile – the general principle of equality is older, more familiar. In Czechia, it is more often and more readily applied by courts and administrative bodies alike. Ground-related anti-discrimination law, on the other hand, is new, and was adopted for the external reason of securing EU membership. It has faced opposition in the Czech Parliament. It has also had a difficult time before the Czech courts, with many anti-discrimination law doctrines frequently misapplied, often in actual breach of EU law: ranging from the requirement of intent in direct discrimination cases to the misapplication of the shift of burden of proof, and an incorrect interpretation of indirect discrimination. This is paradoxical, given that anti-discrimination rights address a graver wrong: while the general principle of equality targets random arbitrariness, irrationality or unfairness, the prohibition of discrimination on specific grounds, focuses on decisions which track deep historical and/or current disadvantages and targets oft-repeated, systematic behaviour and practices.

In Czechia, arbitrary decision-making by the state, which is adjudicated on by the Constitutional Court, is understood as a problem, and the concern extends even to generally arbitrary and even unfair decision making in horizontal relations, mainly in the employment context. The same cannot be said for ground-related discrimination. Two phenomena reveal the pre-

20 The following analysis is taken, in some cases verbatim, from HAVELKOVÁ (2020). Considering this is a discussion comment rather than an independent paper, I allow myself this liberty.

eminence of the general principle of equality over the specific prohibition of discrimination on suspect grounds. First, the two concepts appear to be conflated. This can be seen in the not uniformly clear distinction between their respective standards of scrutiny by the Czech Constitutional Court, and the misapprehension under which the legislator appears to be acting when it comes to identifying specific grounds of prohibited discrimination in statutes (exemplified by the wide proliferation of protected grounds). Second, the general principle and the individualised instances of differential treatment not connected to a specifically protected ground (discrimination *simplex*) are more frequently and readily applied by the Constitutional Court, ordinary courts, and administrative bodies tasked with the public enforcement of the statutes containing anti-discrimination provisions.

This pre-eminence is striking because ground-related anti-discrimination rights are not a mere extension of general equality and discrimination *simplex*. They have different normative underpinnings and pose different adjudicative challenges, with consequent doctrinal differences (at least in EU law). Because these differences have not been recognised, key discrimination doctrines have been largely ignored or misapplied in Czech law. It thus appears that being treated as an extension is probably worse for ground-related anti-discrimination rights than if they had arisen independently (as in many common law countries). In the case of Czechia, the success of the general principle of equality and discrimination *simplex* therefore does not translate into robust ground-related anti-discrimination law; the latter perhaps even being held back because it has false friends that overshadow it.

This is connected with the fact that so few cases are brought by members of disadvantaged groups, which means that the prohibition of discrimination has so far mostly served the comparatively ‘advantaged’. Some members of disadvantaged groups might be unaware of their rights, or even ignorant or too readily acceptant of patterns of inequality. Equally, it is likely – and probably more worrisome – that they do not believe that the system will do right by them (which is, sadly, confirmed by its operation so far). Members of the majority, on the other hand, have been using their right not to be discriminated against quite a bit by comparison, both by claiming discrimination *simplex*, and by using specific grounds: for example as far as sex discrimination is concerned, out of the five cases so far decided on their merits by the Constitutional Court, four were brought by men.

I wonder whether this analysis might be helpful in understanding the weakness and relative lack of success of ground-related anti-discrimination in Chile. For instance, has the specific understanding of the general constitutional guarantee of equality under the Pinochet regime hindered, rather than facilitated, the more recently adopted statutory ground-related guarantees? The history of protecting the already advantaged seems to run particularly strong in Chile. Is that perhaps also a factor in the difficulties that anti-discrimination law is facing more generally, and in the lack of recognition for LGBTQ+ disadvantage worthy of special protection?

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Section III

Anthropological Approaches

Juridification and the Indigenous Peoples in Brazil: The Ambivalence of a Complex Process*

1 Introduction

It is possible to affirm the existence of a process of progressive juridification of issues involving Indigenous peoples in Brazil.¹ Rodríguez Barón, Dandler and Davis emphasize that in the last decades in this area, increasing “normative inflation”, with its inherent ambivalence, would be verifiable within the whole Latin American context.² They additionally point out that this process, also observable in the international sphere, would be the result of an increase of the political expression and influence of Indigenous movements in the Southern Hemisphere.³ Without wishing to delve deeply into the extensive legal literature that addresses this issue in the Brazilian context, the present analysis aims to describe, from an anthropological and sociological perspective, some fundamental aspects involved in the impact of juridification concerning Indigenous peoples in Brazil.⁴

* I would like to express my gratitude to Peter Collin for the invitation to the conference *Law and Diversity – European and Latin American experiences from a legal historical perspective* at the Max Planck Institute for Legal History and Legal Theory. I also thank Eduardo Zimmermann and Nancy Yáñez Fuenzalida for their extremely helpful comments responding to an earlier draft of this essay. *Last but not least*, I thank my dear friend and colleague Pedro Henrique Ribeiro.

1 Juridification (*Verrechtlichung*, in German) will be focused on here from authors such as Jacques Commaille, Jérôme Pélisse, Bruno Jobert, Thierry Delpuech, Laurence Dumoulin, Claire de Galember and Jacques Chevallier, who allude to it using the French term *juridicisation*.

2 RODRÍGUEZ BARÓN (2015); DANDLER (2000); DAVIS (2000).

3 For a concise overview of Amerindian law in international law, see CASELLA (2017). For a more detailed analysis, see STAVENHAGEN (2002). As regards the rights of Indigenous peoples in Brazil, see, for example, AMATO (2014); HEMMING (2003 and 2019); VILLARES (2009) and VILLAS BÔAS FILHO (2003). On the impact of the Universal Declaration of Human Rights on Indigenous peoples, see PEREIRA and VILLAS BÔAS FILHO (2018).

4 Amidst the vast literature that examines the regulation of the interests of Indigenous peoples under Brazilian positive law, see for example: AMATO (2014); SOUZA FILHO

The process of juridification of Indigenous peoples' interests is extremely complex and marked by great ambivalence. Davis, for example, points out that despite the unmistakable advances made in this area (which, according to him, should not be overlooked), it is not possible to disregard the innumerable "obstacles and challenges" and "false beginnings and persistent frustrations" that characterize this process of juridification.⁵ This observation is important because there is a tendency among jurists to consider juridification as a progressive process of implementing guarantees that would only present positive dimensions. Thus, "legal common sense" – unable to perceive the complex and ambivalent character of juridification – can receive a very valuable contribution from an anthropological and sociological perspective.

The process of expansion and consolidation of legal regulation, despite its clear programmatic content in defense of Indigenous peoples, verifiable both in international law and in national legal systems, should not be viewed with excessive optimism because this would conceal its complexity and ambivalence.

First, it should be noted that the process of juridification for Indigenous peoples, in the terms in which it will be defined here, is experienced as the imposition of an exogenous normativity whose rationality greatly diverges from that which guides their forms of regulation and resolution of conflicts. Moreover, in several cases, state regulation of issues involving Indigenous peoples simply ignores their traditional uses and forms of regulation or is based on what Dumont calls "encompassing of contraries" (*l'englobement du contraire*).⁶ Referring to this situation, Davis notes that traditional legal regulation differs substantially from Eurocentric judicial systems which are

(2000); VILLARES (2009); and VILLAS BÔAS FILHO (2003). For a historical analysis that focuses on the legal regulation of Indigenous lands in Brazil, see HEMMING (1978, 1987, 2003, 2008) and LOSANO (2006). On Indigenous rights in international law, see for example: STAVENHAGEN (2002).

⁵ DAVIS (2000).

⁶ The notion of "encompassing of contraries" (*l'englobement du contraire*) proposed by DUMONT (1991) aims to make explicit hierarchy in the context of modern ideology, based on the idea of equality. According to Dumont, hierarchy would not have disappeared in modern societies. It would, in fact, be concealed by the myth of equality. However, the author shows that what we value is implicitly interpreted as the point of reference for a general category that encompasses different values. In this regard, see EBERHARD (2002) and LE ROY (1998). For a critique of the notion, see LUHMANN (2002).

based on written documents, legal professionals, legal processes against adversaries, and decisions in which there are clearly winners and losers.⁷

It is possible to affirm that Étienne Le Roy's "theory of multijuridism" (*théorie du multijuridisme*) provides significant analytical tools for the understanding of a decentralized approach to this problem.⁸ Emphasizing that law (*droit*) is only a specific type of juridicity (*juridicité*) – understood as a general and imposable form of social regulation – Le Roy's theory allows the autochthonous modes of regulation to gain progressive relief and, in this way, to be the object of effective consideration in research concerned with the intricate problems involved in the process of juridification (as will be defined below) of issues pertaining to Indigenous peoples. The "theory of multijuridism" also provides a critical viewpoint of the laudatory perspective of juridification, in order to make explicit the complexity and ambivalence inherent in this process.

Thus, using the "theory of multijuridism", the present article intends to focus on the complexity involved in the progressive process of juridification concerning Indigenous peoples under Brazilian law. Of course, this emphasis on state regulation does not imply a disregard of the importance of other forms of juridicity that actually exist and require attention. However, due to the asymmetry of forces that characterizes the relationship between Indigenous peoples and other social agents that interact with them, it is possible to affirm that in Brazil there would have been, historically and still today, the preponderance of what Le Roy designates as "imposed order" (*ordre imposé*).⁹

Therefore, in order to clarify the ambivalent character of the juridification process of Indigenous peoples' issues in Brazil, a brief conceptual outline of the phenomenon of juridification will be carried out. Then, three illustrative aspects of the ambivalence that characterizes its relationship with Indigenous peoples will be highlighted: (1) juridification as an expression of the supremacy of the "imposed order"; (2) the tendency to disregard autochthonous categories within the scope of the juridification process; (3) the asymmetry

7 DAVIS (2000).

8 On the "theory of multijuridism", see for example: LE ROY (1998, 1999, and 2007), EBERHARD (2002), and VILLAS BÔAS FILHO (2014b and 2015b).

9 LE ROY (1987, 1999). On land disputes, which assume enormous importance for Indigenous peoples, see for example: CUNHA/ BARBOSA (2018), LOSANO (2006), and VILLAS BÔAS FILHO (2003).

of forces between the agents who, through juridification, manage the law to satisfy interests which are contrary to those of Indigenous peoples.

2 Juridification: conceptual outline of a complex phenomenon

The discussion of the phenomenon of juridification or ‘juridicalization’ is quite broad and it is not intended here to restructure it in more detailed terms. This analysis will be based especially on authors such as Jacques Commaille, Laurence Dumoulin, Cécile Robert, and Bruno Jobert on “juridification of politics” (*juridicisation du politique*).¹⁰

The processes of juridification (*juridicisation*) and judicialization (*judicialisation*) are the subjects of special attention of Jacques Commaille’s “political sociology of law” (*sociologie politique du droit*), which associates them with the changes of what he calls the “legality regime” (*régime de légalité*) in contemporary Western societies. As Commaille and Dumoulin emphasize, although these two phenomena are often related, they cannot be confused.¹¹ Thus, in order to make explicit the specificities of these two processes, the main features that Commaille attributes to them, starting with juridification, will be presented below.

Commaille (2010b) emphasizes that juridification, observable in the most diverse domains, characterizes our societies. According to him, juridification tends to be accompanied by the process of judicialization of social and political issues. In the latter case, the ‘judicialization of politics’ reveals a shift in the treatment of certain issues from the political to the judicial arena through the increasingly frequent use of law as a resource by social players. In addition, issues relating to political players, especially concerning corruption, move into legal action.¹²

10 In this regard, the analysis will be based essentially on COMMAILLE (2006 and 2010a). For an analysis that focuses on the issues of juridification and judicialization in Jacques Commaille’s “political sociology of law”, see VILLAS BÔAS FILHO (2015a).

11 COMMAILLE/DUMOULIN (2009).

12 DUMOULIN/ROBERT (2010) 9–10 point out that “ce mouvement de juridicisation du social et du politique – dont témoignent la prolifération de la diversification de la règle de droit, la réglementation des pratiques de financement des partis politiques, l’essor du mouvement constitutionnaliste mais aussi l’émergence de ‘la question du droit [...]’ comme l’un des axes fondamentaux d’un débat politique renouvelé” – s’accompagne d’un processus pa-

Delpeuch/Dumoulin/Galembert highlight two meanings for the notion of juridification: a) the process by which social norms shared by a group are transformed into explicit legal rules. Therefore in this first meaning, juridification refers to the establishment of legal rules designed to regulate a particular relationship or social activity in order to ensure that observance of these rules be imposed by a court. In this signification, the notion is also associated, above all, with the increase of the proportion of legal rules in the regulation of social activity; b) and also with the progressive growth of the mechanisms of imposition of legal regulation, referring in this case also to the phenomenon of judicialization. In this latter sense, juridification expresses the increase of the “binding force” (*force contraignante*) of the legal rules, mainly by the possibility of appeals to instances, with the consequent restriction of autonomy left to agents.¹³

According to Delpeuch/Dumoulin/Galembert, law-making instances often take social norms as reference when defining the content of certain legal rules.¹⁴ However, this law-making process does not consist merely of legislation based on social rules. It implies, sometimes, negotiations and struggles between social agents with diverse conceptions of the world, interests, and values. This approach considers that law holds a high degree of social legitimacy and that, therefore, the juridification of a social norm would result in a reinforcement of adherence to the law. Thus, as García Villegas (2014) observes, there would be a kind of “symbolic efficacy” inherent to law.¹⁵

Based on Bourdieu, Delpeuch/Dumoulin/Galembert emphasize the legitimation effect produced by juridification. According to these authors, juridification symbolically distinguishes a norm from particular interests related to it, concealing everything that is arbitrary and contingent on it, in order to present it as neutral and universal.¹⁶ Referring to the expressive

rallèle de judiciarisation.” In this respect, see the distinction proposed by HIRSCHL (2006, 2008, and 2011) between *judicialization of politics* and *judicialization of mega-politics or ‘pure’ politics*.

13 DELPEUCH et al. (2014). CHEVALLIER (2008) 108 ff. refers to juridification (*juridicisation*) in terms of a “mouvement d’expansion du droit”. Therefore, he emphasizes the “normative inflation” that characterizes it.

14 DELPEUCH et al. (2014).

15 GARCÍA VILLEGAS (2014).

16 This issue is particularly highlighted by BOURDIEU (1986a, 1986b). For a more general analysis of this issue, see BOURDIEU (1991, 2012, 2015, and 2016); DELPEUCH et al. (2014).

analyses of Max Weber, Jürgen Habermas, and Niklas Luhmann, Delpeuch / Dumoulin / Galembert also point out that the juridification of an increasing number of domains of social life is a central aspect of the dynamics of the modernization of Western societies, relating to the emergence and expansion of the modern state.¹⁷

Therefore, Delpeuch / Dumoulin / Galembert (2014) consider that differentiation and complexity, characteristics of Western modern societies, provoke a growing demand for legal regulation. This is related, on the one hand, to the need to organize and regulate increasingly numerous domains of activity and, on the other, to the need to limit the negative externalities that they impose on each other.¹⁸

Moreover, it should be noted that the plurality of perspectives implies that multiple meanings are associated with the concept of juridification. This thus requires a precise definition of this concept. For example, Pélisse (2007) argues that juridification expresses a process of formalization based on the progressive extension of positive law to regulate social relations, especially outside the courts, while judicialization refers to increased recourse to judicial institutions and formal procedures for the resolution of conflicts.¹⁹

Emphasizing the significant confusion between the phenomena referred to by the terms juridification and judicialization, Delpeuch / Dumoulin / Galembert also seek to draw a boundary between them.²⁰ In this sense, they define juridification (*juridicisation*) as the proliferation of positive law, as observable through legislative and regulatory inflation, and the multiplica-

17 DELPEUCH et al. (2014).

18 DELPEUCH et al. (2014). Analyzing the paradoxical dynamics of the processes of juridification of social regulations, mobilize theoreticians from different traditions, referring especially to the theory of communicative action of Jürgen Habermas. It is worth noting that HABERMAS (1989) uses the term *Verrechtlichung* to describe the process of expansion and consolidation of positive law. It should be noted that DEFLEM (2008) and WHITE (1999), for example, point out that there is an evolution in Habermas' position in the process he described in terms of *Verrechtlichung*. The specialized literature on this question is monumental, which makes it pointless to seek to cite it here. For an analysis of juridification from a systemic bias, see TEUBNER (1987). On juridification in the literature available in Portuguese, see for example: O'DONNELL (2000), FARIA (2010), and VILLAS BÔAS FILHO (2009). For an analysis of juridification in the thought of Jacques Commaille, see VILLAS BÔAS FILHO (2015a).

19 PÉLISSE (2007).

20 DELPEUCH et al. (2014).

tion of legal forms of regulation of social relations. In this distinction, it is possible to affirm that one is faced with what Commaille/Dumoulin describe as a global phenomenon of expansion and mutation of legality.²¹ On the other hand, Delpeuch/Dumoulin/Galembert define judicialization (*judicialisation*) as the progressive increase in the power of judges and courts.²² For this reason, Commaille points out that the term judicialization means to some authors a shift from the executive and legislative powers towards the judiciary to ensure the regulation of politics in the inner place of politics.²³

However, according to Commaille/Dumoulin, although judicialization can be broadly considered as a form of juridification, the relationship between these two phenomena is not linear, direct, or congruent.²⁴ On the contrary, as the authors point out, one cannot focus on judicialization as a direct expression of juridification, since the relations established between these phenomena are complex and depend on historical and national configurations and can thus assume concrete different articulations. Thus, alluding to Barry Holmström's analysis of the Swedish experience, Commaille/Dumoulin seek to highlight concretely the non-linear relationship between juridification and judicialization.²⁵

According to Commaille/Dumoulin, in the Swedish context, increasing judicialization was not due to juridification but rather to a kind of compensation arising from the reflux of the role of jurists in political life.²⁶ Therefore, it was the expression of the progressive scarcity of the influence of jurists on the state apparatus that would have, in compensatory terms, increased reinforcement of the courts as a kind of 'third power'. In this

21 COMMAILLE/DUMOULIN (2009).

22 DELPEUCH et al. (2014). For an analysis that focuses on judicialization in terms of a destabilization of the traditional "territories of justice" in the French context, see COMMAILLE (1999, 2009, 2015, and 2019). On judicialization in the French discussion, see ROUSSEL (2003).

23 COMMAILLE (2013). In this respect, see COMMAILLE (2009). It should be noted that it is especially in this way that Brazilian sociological literature is directed. In this regard, see for example: AVRITZER/MARONA (2014); CAMPILONGO (2000 and 2002); MACIEL/KOERNER (2002); NOBRE/RODRIGUEZ (2011); VIANNA et al. (1999 and 2007).

24 COMMAILLE/DUMOULIN (2009).

25 COMMAILLE/DUMOULIN (2009).

26 COMMAILLE/DUMOULIN (2009).

sense, judicialization derived, ultimately, from the ‘de-juridification’ of political life and the Swedish state apparatus.

Therefore, it is not possible to confuse or relate such phenomena in terms of subsumption or automatic reciprocal derivation. This observation is particularly important in a complex social context such as in Brazil. It is not inconceivable that in Brazil distinctive arrangements occur between such phenomena and, in addition, that they occur in a varied way when dealing with different issues. As pointed out, judicialization may in some cases result from juridification and, in others, as compensation, from ‘de-juridification’. However, *vis-à-vis* issues involving Indigenous peoples in Brazil, it seems possible to affirm the existence of a trend of judicialization driven by increasing juridification.²⁷

As mentioned, this paper focuses only on the ambivalent aspects of juridification, which does not of course disregard the importance of judicialization. The emphasis here on juridification stems only from the assumption (itself plausible, even if still calling for a more effective analysis) that, regarding issues involving Indigenous peoples in Brazil, there would be a tendency for the process of juridification to inflect on the process of judicialization. Therefore, it is necessary to analyze juridification prior to analyzing judicialization.

Several examples could be mobilized to illustrate this trend. Among them, the action promoted by the Panará Indigenous people for the repossession of their lands in the Iriri River region is emblematic. It was a declaratory action against the federal government, the National Indian Foundation (FUNAI) and the National Institute for Colonization and Agrarian Reform (INCRA) in 1994. The Panará Indigenous people had been transferred to the Xingu Indigenous Park which guaranteed the survival of its members. In the declaratory action of 1994, the Panará Indigenous people, two decades after their transfer and through the management of law, obtained the exclusive usufruct of an area close to the one that was occupied by them when the contact was made.²⁸

27 For a compilation of the expressive Indigenous legislation in Brazil, see for example: VILLARES (2008). Concerning the impact of the Federal Constitution on Brazilian legal order on this issue, see for example: AMATO (2014); LOSANO (2006); VILLARES (2009); VILLAS BÔAS FILHO (2003, 2006, and 2014a).

28 In this respect see HEMMING (2003); HEMMING et al. (1973); DAVIS (1977); and VILLAS BÔAS FILHO (2006 and 2014a).

However, this action depended first on the emergence of Indigenous peoples as new players who, in the clash of forces that took place in the “indigenist field”,²⁹ gradually began to use law to protect their interests. Secondly, it depended on the progressive juridification of historical claims of Indigenous peoples, especially with regard to their culture, language, social organization, and traditionally occupied lands, claims that were incorporated into the Brazilian Federal Constitution of 1988.³⁰

3 Juridification as an expression of the supremacy of the “imposed order” over “negotiated order”, “accepted order”, and “contested order” (a brief incursion into the typology of Étienne Le Roy)

It is worth noting that, with respect to Indigenous peoples, juridification as defined above expresses a progressive expansion of the Western “juridicity” (*juridicité*) as defined by Le Roy, on the autochthonous forms of social and legal regulation.³¹ According to Le Roy, in Western “juridicity”, the normative dimension of legal regulation is predominant, while in several traditional societies customs and *habitus* prevail.³² This means that the process of juridification, by creating an overlap of Western juridicity over Indigenous peoples, imposes on them a form of regulation distinct from that which they have traditionally developed.

It should be noted that, according to Le Roy, “juridicity” (*juridicité*), of which “law” (*droit*) is only a specific form of expression, is composed of “general and impersonal norms” (*normes générales et impersonnelles* – NGI), “conduct and behavior models” (*modèles de conduites et de comportements* – MCC), and “systems of durable dispositions” (*systèmes de dispositions durables* – SDD).³³ However, societies do not organize the foundations of their “juri-

29 Regarding the notion of “indigenist field” see VILLAS BÔAS FILHO (2014a, 2016a, and 2017).

30 This case illustrates the ambivalent nature of the legal process already mentioned because, as Eduardo Zimmermann pointed out in his commentary on the draft of this text, this is a situation in which a subaltern group used mechanisms of positive law to their advantage, notwithstanding their origin in Eurocentric judicial systems. Nancy Yáñez Fuenzalida also emphasized this point in her comments on my draft.

31 LE ROY (1987, 1999, 2013b, 2014, and 2017).

32 LE ROY (1998, 1999, 2007, and 2017).

33 LE ROY (1998, 1999, 2007, and 2017).

dicity” in the same way. There is, consequently, variability in the arrangements of the “foundations of juridicity”.

Le Roy proposes a comparative table that explains the possible arrangements experienced by these three “foundations of juridicity” in “four great legal traditions”.³⁴

Legal traditions	Main foundation	Secondary foundation	Tertiary foundation
Western / Christian	NGI	MCC	SDD
African / Animist	MCC	SDD	NGI
Asian / Confucian	SDD	MCC	NGI
Arab / Muslim	NGI	SDD	MCC

Le Roy (1987 and 1999) also recommends an “ideal-type” distinction to explain the different modes of conflict resolution, among which the following types of orders are indicated: a) “accepted order” (*ordre / ordonnancement accepté*), a dyadic mode of solution in which the disputes do not turn into conflicts once the parties manage to compromise on their claims; b) “contested order” (*ordre / ordonnancement contesté*), a dyadic mode of solution, in which conflicts end with the victory of the strongest or the most able; c) “negotiated order” (*ordre / ordonnancement négocié*), in which the intervention of a third party occurs for the solution of conflicts and in which legal norms are non-mandatory models; d) “imposed order” (*ordre / ordonnancement imposé*) which expresses the transformation of conflicts into litigation that are resolved through the application of positive law by a judge.³⁵ Rouland mobilizes this distinction, for example, in his analysis of alternative forms of conflict resolution.³⁶

Therefore, understood as an expression of a progressive expansion of the “imposed order”, the phenomenon of juridification is not something straightforward with respect to Indigenous peoples because it tends to impose an “arrangement of juridicity” and a form of conflict resolution that are external to them. This fact does not, however, deny the positive facet of

34 LE ROY (1999).

35 LE ROY (1987, 1999).

36 ROULAND (1988, 1995, and 2003).

the juridification process, but only stresses its complex and ambivalent character with regard to Indigenous peoples.

According to Davis and Dandler, in Latin America for instance, the juridification of Indigenous issues tended precisely to establish the “imposed order” as hegemonic in the resolution of conflicts.³⁷ Moreover, recovering what was said by Guillermo Arancibia López, Minister of the Supreme Court of Bolivia, Davis emphasizes something that is directly applicable to the Indigenous peoples in Brazil: the legal system suffers from a considerable degree of imposition, which means that very little attention is given to appreciating, analyzing, and consulting cultural values, local circumstances, or the specific factors involved in a dispute. There is a tendency to fix the “imposed order” to the detriment of others.³⁸

Incidentally, Rodríguez Barón based on Segato, observes that the emphasis on the demand for recognition of land rights has tended to divert the attention of Indigenous peoples away from the recognition of their own conflicts.³⁹ Thus, referring to the Argentine case, the author emphasizes that progress in the demarcation of Indigenous territories was not accompanied by the effective retrieval of the proper forms of conflict resolution and genuine self-government by Indigenous peoples. Segato highlights the same phenomenon in the Brazilian context.⁴⁰

37 DAVIS (2000), DANDLER (2000). Referring to the way in which the process of juridification ends concretely in judicialization, Davis points out that the differences between the written law and the social realities of Latin American countries are remarkable. While anthropologists increasingly perceive the multiple nature of legal systems in Latin America and the persistence of traditional, local, or village law regimes, the latter remain subject to national legal regimes and little known to judges and lawyers in most countries.

38 DAVIS (2000) 173. For an analysis of the “peasant rounds” (*rondas campesinas*/*rondes paysannes*) and their tensions with the official order in the Andean region, see PICCOLI (2011). This issue refers to discussions on legal pluralism. For an overview of the pluralistic discussion within the framework of legal anthropology, see, for example, BERTINI CHIRIBOGA/YÁÑEZ FUENZALIDA (2013); DUPRET (2003, 2005, 2010, and 2016); EBERHARD (2003); MOORE (2014); ROULAND (1988, 1995, and 2003); SIERRA/CHENAUT (2002); TAMANAHA (2000); and VANDERLINDEN (2009, 2013a, 2013b, 2013c, and 2013d). On inter-legality, see SANTOS (2002 and 2003). For a perspective that intends to order legal pluralism, see DELMAS-MARTY (2006). On the issue of juridicity, see LE ROY (1998, 1999, and 2013b) and VILLAS BÓAS FILHO (2014b and 2015b).

39 RODRÍGUEZ BARÓN (2015); SEGATO (2014).

40 SEGATO (2014).

4 The tendency to disregard autochthonous categories in the juridification process

In addition to this tendency to impose a form of conflict resolution (“imposed order”) which is largely foreign to the traditional forms of regulation among Indigenous peoples, the process of juridification also frequently leads to the disregard of Indigenous categories. Eberhard observes that:

“When we translate a cultural perspective different from ours, we do it through our own culture. To give just one example: in the case of the recognition of the rights of Indigenous peoples, the predominant view in the Western world transforms this demand into an anthropocentric demand for collective rights.”⁴¹

This problem is especially visible in land issues where frequently there is a kind of ‘translation’ of traditional concepts of land use and appropriation into a categorical system founded on a concept of property unknown to Indigenous peoples. It could be said that this is what Dumont refers to as “encompassing of contraries” (*l’englobement du contraire*).⁴² In fact, it should be noted that the ignorance and ethnocentrism of the ordinary jurist, in engendering a simplistic beaconing that nullifies all differences concerning the use and appropriation of land, contribute to producing situations of great injustice and, in addition, potential conflicts, since they either distort and misrepresent the Indigenous concepts or simply, disregarding them, impose on them an external concept (by mobilizing the “lack argument”).⁴³

This issue was evidenced, for example, in the trial of the “Raposa Serra do Sol” Indigenous Land by the Brazilian Supreme Court. The nineteen determinants for the recognition of Indigenous lands in the trial of this reservation, besides clearly restricting the autonomy of the Indigenous peoples of

41 EBERHARD (2008) 13.

42 DUMONT (1991).

43 In addition to MATTEI/NADER (2008) see EBERHARD (2002), LE ROY (1998), and VILLAS BÔAS FILHO (2015b, 2016a, 2016b, and 2016c). As Eduardo Zimmermann correctly observed in his comments on my text, it may be too much to ask lawyers and judges to become interpreters or legislators of a multicultural society. This is certainly true. However, a legal education that considers the elementary aspects involved in intercultural relations might contribute to mitigating (although not resolving) potential conflicts in this field. Of course, one cannot disregard the political and economic interests also involved in these issues.

Brazil, were crossed by great ethnocentrism and incomprehension of the Indigenous concepts about the use and appropriation of land. In this respect, it should be noted that the most shocking and absurd condition – not included in the enumeration but in the body of the decision – is the establishment of October 5, 1988 (date of the promulgation of the Federal Constitution of Brazil) as an arbitrary cut-off date for the recognition of lands occupied by Indigenous peoples. This decision expresses precisely the gross imposition of the Western concept of land use on Indigenous peoples.⁴⁴

In this regard, Le Roy's theory seems to be fundamental. Based on broad fieldwork carried out over decades between various African societies, especially among the Wolof of Senegal, and the development of a deep theoretical discussion that mobilized compelling authors of legal anthropology, Le Roy examines the plurality of land tenure regimes.⁴⁵ Based on his research, Le Roy criticizes the indiscriminate projection of the “paradigm of exchange” (*paradigme de l'échange*) for all societies.

Thus, problematizing classical interpretations such as those of Marcel Mauss and Claude Lévi-Strauss, Le Roy emphasizes the heuristic potential of the “paradigm of sharing” (*paradigme du partage*), especially for the understanding of communal land use.⁴⁶ This discussion, whose empirical horizons are African societies, can with due adaptations offer an important instrument of understanding (of a non-ethnocentric character) of the relation of Brazilian Indigenous peoples to their traditional lands. The complexity of such an approach cannot be resumed here. As a simple example of what is involved in the scope of this kind of approach, it should be noted that Le Roy observes that the difference between land tenure regimes can be expressed in two propositions.

First, Le Roy argues that land rights are the realization of different ways of thinking about space and social relations.⁴⁷ It follows that, in order to understand the distinctiveness of modern private property law, it is necessary to

44 On the question of translation in the context of interculturality, see EBERHARD (2008, 2009, 2010, 2012 and 2013). Concerning this arbitrary cut-off date for land claims, called “marco temporal”, see CUNHA/BARBOSA (2018).

45 LE ROY (2011, 2013a, 2014, and 2015). For an analysis of the book *La terre de l'autre*, see MÍGUEZ NÚÑEZ (2014).

46 LE ROY (2014).

47 LE ROY (2013a and 2017).

relate this invention to a “geometric representation” of the space that, by measuring the surface, gives it a use-value, an exchange value, and introduces it into the market. However, in order to understand the equally important originality of autochthonous, Aboriginal, or Indigenous land rights, which often reject the commercial use of land, it is essential to mobilize two other representations: “topocentrism” (in which a point is the center of attraction of social relations) and “odology” (“science of paths”, observed by the author among the hunter-gatherer peoples of the Republic of Congo, among the pastoralists of the African Sahel, and among Australian Aborigines and natives of Quebec).⁴⁸

Second, contemporary land tenure regimes combine originally distinct, sometimes competing, and often contradictory systems of law that are forced to adjust to one another. Thus, each regime of appropriation, as experienced by a specific group, constitutes a combination of devices of varied origins that rely on distinct rational choices. This brief allusion to the analysis proposed by Le Roy makes it possible to explain how useful it is for the critique of ethnocentrism that generally underlies the analyses made by jurists regarding the land rights of Indigenous societies.⁴⁹

5 The asymmetry of forces among the agents who, through the juridification process, manage state law to achieve gains contrary to those of indigenous peoples

Finally, in relation to the two preceding questions, there is the problem of the asymmetry of forces between agents who, through the juridification process, use state law to gain advantages contrary to those of Indigenous peoples. Although it is not a question of adopting an “instrumentalist” view of law, it is not possible to disregard the asymmetrical relations of forces that, in the legal field, guide what Bourdieu calls “competition for the monopoly of the right to say what is right” (*concurrence pour le monopole du droit de dire le droit*).⁵⁰ On this issue, Commaille referring to Galanter, emphasizes

48 Eduardo Zimmermann is right to point to the dilemmatic nature of this problem when he, in consonance with James Scott, asks how to reconcile local uses of land tenure with the standing legal orders and even with the structure of modern nation-states.

49 LE ROY (2011, 2013a, and 2014). See SIERRA/CHENAUT (2002).

50 BOURDIEU (1986b) 4. He criticizes both the “formalist” vision, which advocates an absolute autonomy of legal form in relation to the social world, as well as the “instrumental-

the need to consider that “the ‘players’ of justice do not have equal resources” (*les “joueurs” de justice ne disposent pas de ressources égales*).⁵¹ Because of the asymmetry of forces that characterizes the struggles concerning the rights of Indigenous peoples, the process of juridification might serve as an instrument of plunder against such peoples.⁵²

Mattei/Nader, through a historical-anthropological analysis, seek to point out how concepts such as “civilization”, “democracy”, “development”, “modernization”, and “rule of law”, can serve as support for the plundering of resources and ideas by the hegemonic Western capitalist countries.⁵³ Examining what they call “law’s dark side”, Mattei/Nader seek to demonstrate the increasing use of the “Rule of Law” idea to legitimize plunder.⁵⁴ In order to indicate a nexus of continuity between colonialism and neoliberal capitalism, they emphasize that the rhetorical use of the “Rule of Law” would serve as a “camouflage” of plunder by Western capitalist countries on a global scale.⁵⁵

ist”, which conceives law as a reflection or tool in the service of the dominating group. The first is associated with authors such as Hans Kelsen and Niklas Luhmann and the second to authors like Louis Althusser.

51 COMMAILLE (2007) 263; GALANTER (2006).

52 Hemming’s expressive analysis is full of examples in this regard. Referring to the context of drafting the Brazilian Constitution of 1988, HEMMING (2003) 348 remarks that “Brasília was full of vociferous lobbies, each clamoring for recognition in the Constitution. Some of these mounted threats to the Indian cause. [...] A far more serious threat came from the mining lobby.” DAVIS (1977) highlights the lobbying of large foreign mining companies in Brazilian legislation during the military regime. These companies played a central role in opening new mining frontiers affecting different Indigenous lands.

53 MATTEI/NADER (2008) define plunder as the theft of another’s property through force, especially in times of war (pillage) and also of appropriation obtained through fraud or force. According to the authors, it would be especially the second definition that would express what they call “the dark side of the rule of law”. Concerning the plunder of Indigenous communities, see also NADER (2002) and VILLAS BÔAS FILHO (2016a and 2017).

54 MATTEI/NADER (2008).

55 MATTEI/NADER (2008). In his comments on my paper, Eduardo Zimmerman pointed out that rhetorical use of the “Rule of Law” could also serve as camouflage for opportunistic rent-seeking behavior. This can obviously happen. However, due to the asymmetry of forces between Indigenous peoples and other social players with opposing political and economic interests, it is reasonable to assume that the rhetorical manipulation of the “Rule of Law” for plundering purposes tends to prevail. In this regard, see GALANTER (2006) and COMMAILLE (2007).

Mattei/Nader argue that the law, in its current configuration, legitimates the plunder carried out both in international and national contexts.⁵⁶ For the authors, the rhetoric of hegemonic countries would consist - by mobilizing the “lack argument” – in attributing to other societies the incapacity of an institutional and juridical organization comparable to that of Western countries.⁵⁷ Thus, in this perspective the “lack argument” is also used as rhetorical support for the transfer of Western law to other societies. The purpose of this text is not to critically discuss the thesis held by the authors. What is important to highlight here is the possibility of the instrumentalization of the process of juridification for the plunder of Indigenous peoples.

According to Davis, Dandler, and Hemming, in Latin America there would have been a tendency during the 1990s to adopt constitutional reforms or to promulgate new constitutions containing significant clauses regarding the rights of Indigenous peoples.⁵⁸ In the Brazilian case, there is an increasing production of infra-constitutional norms that, when regulating various issues, focuses on Indigenous peoples.⁵⁹ Therefore, it is possible to verify the existence of a juridification process, which in general terms, is favorable to Indigenous peoples. However, as Davis points out, these advances (which should not be underestimated) cannot hide the ambivalence of a complex process.⁶⁰

Several examples illustrate the instrumentalization of juridification for the plundering of Indigenous peoples’ rights in Brazil. Hemming, analyzing the Law of Lands of 1850, emphasizes the instrumentalization of positive law for the land plundering of Indigenous peoples in Brazil.⁶¹ Dandler, for

56 MATTEI/NADER (2008).

57 This argument was historically mobilized (and still is) in discourses that preach ‘inferiority’ of Indigenous societies. Concerning Brazilian history, see especially the expressive work of HEMMING (1978, 1987, 2003, 2008, and 2019). For a critique of such discourses, it is possible to refer to CLASTRES (2011). In this respect, see also VILLAS BÔAS FILHO (2016b). For a contrast between Laura Nader and Ugo Mattei’s “lack argument” and Étienne Le Roy’s idea of “logic of subtraction”, see VILLAS BÔAS FILHO (2015b). For an analysis that illustrates this issue very well in African societies, see LE ROY (2004).

58 DAVIS (2000); DANDLER (2000); HEMMING (2003).

59 For a compilation of such legislation, see, for example, VILLARES (2008).

60 DAVIS (2000). Declining to say that these ambivalences are not properly considered by those who, trapped by a formalistic and positivist vision like SOUZA FILHO (2000), believe in the panacea of a “rebirth of the Indigenous peoples to law”.

61 HEMMING (1987) 179-180 asserts emphatically that “the assault on Indian land was effectively codified in the Law of Lands of 18 September 1850. This was the basic property

example, mentions the Decree no. 1,775 dated January 8, 1996 which, in a way that was contrary to the interests of Indigenous peoples, disposed of the administrative procedure for the demarcation of their lands.⁶² Focusing on the period of military regime in Brazil, Davis (1977) indicates numerous examples in which the law was mobilized as a way of supporting agribusiness interests against Indigenous peoples.⁶³ Mattei and Nader, analyzing the use of the “Rule of Law” for the plundering of ideas, illustrate this practice alluding to a patent case involving the traditional knowledge of Kayapo Indians in Brazil.⁶⁴ More recently, a controversial constitutional amendment project (PEC 215) also serves as an illustration of the use of state normative production to support interests contrary to those of Indigenous peoples.⁶⁵ The current government in Brazil, in association with national and international groups, does not hide its interest in the exploitation of Indigenous lands. For this purpose, the Brazilian president, through a decree (MP 886), attempted to transfer the demarcation of Indigenous lands from FUNAI to the Ministry of Agriculture.⁶⁶

legislation of the Brazilian Empire. It defined private lands as those that were purchased, legally owned and occupied. This principle, which guaranteed colonists’ rights, ‘was of dire consequence for the natives. Indians were generally unable to take the necessary legal steps to consolidate their territorial rights. As a result, many of them came to lose their rights over such land, either from ignorance or inertia, or as a result of the astuteness or wicked initiatives of their neighbours.’ This same law awarded unoccupied lands (*terras devolutas*) to the state.”

62 DANDLER (2000).

63 DAVIS (1977).

64 MATTEI/NADER (2008) 86 affirm that “the Kayapo are only one example. [...] The best-known example is the Indian *neem* plant (the village pharmacy), traditionally serving many health purposes. Western scientists ‘discovered’ the active principle and then obtained a patent for oral hygiene use in Florida.” This case illustrates very well the distinction between the “paradigm of exchange” and the “paradigm of sharing” recommended by LE ROY (2014). In this respect, see also ROCHFELD (2014).

65 PEC n. 215/2000 proposes to include, among the exclusive competences of the Brazilian National Congress (in which there is intense agribusiness lobbying) the approval of demarcation of lands traditionally occupied by Indigenous peoples and ratification of already approved demarcations.

66 HEMMING (2019) 213 asserts that “in 2019, Brazil’s indigenous peoples faced a terrible unforeseen challenge. [...] the new president was deeply hostile to Indians, whom he regarded as an anachronistic impediment to progress. He and his ‘ruralist’ lobby in Congress openly coveted the vast indigenous territories and their natural resources of timber, minerals, and potential farmland.”

6 Conclusion

The adequate comprehension of a complex and multifaceted phenomenon requires the consideration of its constitutive aspects. My point is that juridification is a complex and ambivalent process with both positive and negative aspects. Therefore, juridification cannot be uncritically celebrated only as a form of recognition of the self-determination of Indigenous peoples and as an instrument for the maintenance of their traditional forms of legal regulation. This is certainly true, but it is just one aspect of this complex process.⁶⁷ Metaphorically, it would be possible to affirm that juridification is a Janus-faced process that, along with its positive dimension, also has a negative one. Hence, without disregarding the unmistakable positive dimension of this process which is generally emphasized, the present analysis has focused on the challenges involved in its negative dimension.⁶⁸

Thus, in order to highlight the complexity and ambivalence that characterize the process of juridification of issues related to Indigenous peoples in Brazil, a brief reconstruction of Jacques Commaille's conception of juridification was carried out. This reconstruction aimed to make explicit the theoretical reference mobilized here for the analysis of the phenomenon of juridification. Subsequently, with the aim of illustrating the ambivalent nature of this phenomenon in relation to Indigenous peoples, three questions were investigated: a) juridification as an expression of the supremacy of the "imposed order"; b) the tendency to disregard autochthonous categories in the scope of the juridification process; c) the asymmetry of forces between the agents who, through juridification, manage the law to satisfy interests contrary to those of Indigenous peoples. All these issues underscore the vulnerability of Indigenous peoples and the deviations of legal regulation

67 It is worth mentioning that, with respect to this complexity of juridification, the accurate considerations made by Eduardo Zimmermann about the implications of my analysis on issues such as citizenship and sovereignty are crucial. However, the treatment of these issues goes beyond the limits of my analysis.

68 For this reason, I consider that all the pertinent critical comments made by Nancy Yáñez Fuenzalida to the draft of my article do not invalidate my point. I even agree with almost all of her analysis regarding the importance of juridification for the recognition of Indigenous forms of legal regulation (which leads us to the question of the recognition of legal pluralism) and for the support of a potential counterhegemonic legal reaction on the part of Indigenous peoples. However, these were not the aspects that I sought to analyze.

in the Brazilian context, which, as Moser emphasizes, is characterized by self-imperialism.⁶⁹

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69 MOSER (2016).

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Racial Thinking and Ethnic Minorities in Latin America

I will divide my comments in two parts. In the first part I offer a few examples of my work as a historian, tracing the origins of racial thinking in Argentina, and the ways in which, despite a prevalent belief in the powers of Argentine society to socially assimilate and integrate, the present cultural and social climate regarding ethnic minorities has been marked by a parallel and long-standing current of mistrust towards those considered racially 'inferior'. In the second part, I will consider some matters arising from Professor Villas Bôas's paper, which I think are worthy of discussion.

I

A more complete review of relevant literature on the intellectual history of racial thought, ethnic minorities and cultural diversity in general should probably cover three main bodies of literature, which even today are expanding very productively in Argentine historiography. The first comprises studies of slavery and abolition in the River Plate in the early 19th century; the second, studies of indigenous tribes, the frontier, and the state-building process; the third, studies of the process of massive European immigration and the consequent debates over the process of assimilation and/or preservation of original cultural identities.¹ In the following paragraphs I will focus only on some examples of the reactions that the presence of European

1 GRAHAM (1990) and STEPAN (1991) provide very useful general overview on race and racial thinking in Latin America. VACANO (2012) explores the presence of race in Latin American political thought. A recent collection provides several points of entry to the issue of race in Argentina: ALBERTO/ELENA (eds.) (2016). For the Afro-descendants in Argentina, the classic pioneering work by ANDREWS (1980) and BORUCKI (2015). Two recent studies explore the intersection of race and gender in Argentina: EDWARDS (2020) and KERR (2020). NOVOA/LEVINE (2010) studies the ways in which Darwinian evolutionism interacted with racial thought.

migrations generated, fuelled by the expansion of diverse currents of racial thought at the turn of the century.

Intellectual life and political debate in late 19th-century Argentina was marked by growing concern about the relative backwardness of the country's political culture and about the consequences of the social transformations produced by immigration, urbanization and industrialization. After decades of civil wars and rebellions by provincial caudillos, the country was politically stabilized, and a constitution sanctioned in 1853. Consolidation of the nation-state was also facilitated by the conquest of the frontier and the displacement of Indian populations. Prompted by the incorporation of new lands and the subsequent increase in cereal production and exports, massive immigration and influx of European capital, economic growth led to important changes in the social and economic fabric of the country, now entering a new 'age of progress'.

However, public debates tended to reflect deep-seated fears of racial degeneration, or even permanent racial inferiority. This produced a curious tension between the notions of progress and decline, both of which were connected to the racial composition of the country in a line thought that was not uncommon in the whole region. The "inevitable anarchy of the Spanish American republics" was due, according to Gustave Le Bon, to "the mere fact that the race is different and lacks the qualities possessed by the people of the United States [...]". Many Latin American intellectuals and statesmen made the dictum their own and, despite important variations from country to country regarding the value of *mestizaje* and the Whitening ideal, it became a generally accepted belief. In Argentina, Lucas Ayarragaray, a physician who, like many of his colleagues, combined his profession with intellectual and political activities, wrote extensively on the problem of race, closely following Le Bon's arguments. Argentina's political shortcomings were ultimately due to "the hereditary constitution" and had to be treated as a problem of "biological psychology". Without improvement to the country's racial stock by the addition of European immigrants, he stated, it would be impossible to adapt Western institutions because these had developed "amidst homogeneously superior populations" while Argentina's had a "degenerative propensity".² In *Nuestra América* (1903), Carlos Octavio Bunge

2 LE BON (1899), this is the English translation of LE BON (1894) 148–152; AYARRAGARAY (1904) 2, 276; AYARRAGARAY (1912 and 1916).

attributed to the difference in ethnic composition the struggles between Buenos Aires (European) and the interior (Indian and Mestizo), Buenos Aires benefiting from the fact that its Indian population had been devastated by alcohol, smallpox and tuberculosis, thus “purifying its ethnic elements”. In his commentary on the Second National Census (1895), Gabriel Carrasco stated that although the Latin race predominated in the local population, “Germanic, Anglo-Saxon, and Scandinavian races contribute to its improvement”. The result would be “a new and beautiful white race produced by the fusion of all European nations on American soil”.³

Socialist intellectuals and politicians shared many of the assumptions of the evolutionist-racist approach expounded by liberals and conservatives. Ideas that later became symbols of reactionary politics, such as the intrinsic superiority of certain racial groups over others or the need for a ‘scientific’ regulation of racial purity were then ‘progressive’ notions shared by liberals, socialists and conservatives alike, both in Argentina and in the countries where many of these doctrines originated.⁴ José Ingenieros, a socialist writer and one of the most influential Latin American intellectuals of the time, revealed how far the new evolutionary ideas and the principle of the struggle for life in particular had gone in the formation of the new outlook when he declared that the republican trilogy of “liberté, égalité, fraternité [...] was scientifically absurd. Determinism denies liberty, biology denies equality, and the principle of the struggle for life, which rules over every sentient being, denies fraternity.” He was also one of the foremost advocates of racial interpretations of social phenomena. The superiority of the white race, said Ingenieros, made inevitable in America the progressive substitution of the indigenous races, as exemplified by the emergence of an ‘Argentine white race’.⁵

Rising crime rates in urban centres and the numbers of Italians and Spaniards arrested by the police for criminal offences were also easily attributed to racial factors in line with the Italian school of criminology, which had many adepts among Argentine jurists. The late 1880’s saw the foundation of the *Sociedad de Antropología Jurídica*, which included in its membership a number of notable intellectuals such as José María Ramos Mejía, José Nicolás Matienzo, and Rodolfo Rivarola. Luis María Drago’s *Los hombres de*

3 BUNGE (1918) 157–163; CARRASCO (1898) xlv, xlviii.

4 I have analyzed these trends in ZIMMERMANN (1992).

5 INGENIEROS (1906) x; INGENIEROS (1915).

presa (1888) and Antonio Dellepiane's *Las causas del delito* (1892) were the first works of Argentine jurists who adhered to the new school. The publication of a scientific journal, *Criminalología Moderna*, in 1898 marked the beginning of its expansion. The journal, founded in Buenos Aires by Pietro Gori, an Italian lawyer who sympathized with peaceful anarchism, listed the leading Italian criminologists among its collaborators (Lombroso, Ferri, Garofalo, Colajanni), and united many of their leading Argentine counterparts: A. Dellepiane, L.M. Drago, O. Piñero, R. Rivarola, J. Vucetich (who developed fingerprinting as a means of perfecting the anthropometric identification of criminals), and José Ingenieros.

In 1908 José Ingenieros wrote the prologue to the work of a colleague from the *Instituto de Criminología*, Eusebio Gómez, which summarised the approach of the new Argentine criminological school and its tendency to combine both approaches. Criminals did not know they were the victims of a complex determinism, based on both heredity and milieu: “espíritus que sobrellevan la fatalidad de herencias enfermizas o sufren la carcoma inexorable de las miserias ambientales” (“spirits who bear the fatality of unhealthy inheritance or suffer the inexorable rot of environmental misery”).⁶

Labor activism was also viewed as another dimension of ‘the racial problem’: anarchists were considered psychologically prone to experience ‘emotional crisis’ that could lead them – as in the assassination attempt against President Quintana – to an “abnormal spiritual condition”. As for their physical features, deformed ears were seen as “an evident sign of degeneration”, or, as in the case of Simon Radovitzky, who killed Police Chief Ramón L. Falcón in 1909, “an excessive development of the inferior jaw, a depression in his forehead, a light facial asymmetry” which revealed “the stigma of criminality”.⁷

The new science of eugenics also provided scientific arguments for those searching for rational solutions to the new social problems caused by the accelerated pace of immigration, urbanization and social change. Among criminologists it was not unusual to discuss the merits of “an artificial selection, more efficient and quicker than natural selection, to be realized

6 INGENIEROS (1908) 5–15.

7 “Radovitzky, Simón. Por homicidio en las personas de Ramón L. Falcón y Alberto Lartigue. Alegato del Agente Fiscal, Dr. Manuel Beltrán”, Archivo General de la Nación, Tribunal Criminal, Letra R, Legajo No. 5, 1872–1909, 172.

through the sterilization of degenerate individuals". Social life, therefore, required the elimination of those criminal types that through heredity could 'infect' society and produce its moral and physical degeneration. The consequences deriving from eugenics went beyond criminology: the causes of poverty and economic inequality were identified by some as originating in heredity. But eugenics also led many to reverse this causal order and to place more emphasis on the influence of poor standards of living on the deterioration of biological traits, thus pushing for social reform.

Many of these trends were entrenched by the emergence of more authoritarian nationalist movements during the interwar years. My purpose in presenting such sketchy observations here is to point out that the legacy of these movements can be found in many contemporary attitudes to the treatment of ethnic minorities in contemporary Argentina. The history of these precedents, therefore, is of direct relevance to discussing the problems that legal theory faces when confronting the standing of these groups in society.

II

I am not a legal theorist, so I couldn't possibly comment on the more specifically 'technical' dimensions raised by the very interesting paper presented by Professor Villas Bôas. Therefore, I will limit myself to suggesting a number of matters arising from my reading of his text, which I think might be worth considering for a general discussion. In some cases I shall take advantage of my status as an 'outsider' looking in to play devil's advocate.

1. *Citizenship* and the "imposition of exogenous normativity". I would suggest we can frame this point within a more general question: Is it possible to think about some conception of citizenship that would not require some degree of exogenous normativity on the various groups that compose any particular polity? This, of course, raises many interesting theoretical points that go well beyond the scope of Professor Villas Bôas' paper.

2. On the other hand, there are many other important questions that do arise from the paper. Is the notion of citizenship a part of contemporary debates about indigenous peoples in Brazil? Are there indigenous groups that claim access to rights as defined in the standard conception of citizenship, such as civil liberties, electoral rights, social and welfare benefits, etc? What about

the rise of the new ‘identity politics’? Are the demands of indigenous groups to be encompassed by this new rubric and the challenges it poses to the universalism of human rights and citizenship?

3. Traditional systems of conflict resolution “differ substantially from Eurocentric judicial systems based on written documents, legal professionals, legal processes against adversaries, and decisions in which there are clearly winners and losers”. Do indigenous groups perceive no benefits in the use of these mechanisms (e. g., written documents, legal professionals) in order to advance their claims? In other contexts, legal historians have shown the ways in which subaltern groups have used these mechanisms to advantage, notwithstanding their origin in Eurocentric judicial systems.

4. It seems to me that in many passages what the paper presents as the preponderance in Brazil of what Le Roy (1987, 1999) designates an “imposed order” (*ordre imposé*) transcends the discussion of legal theory and indigenous groups in the contemporary world to raise a more general point about the processes of state formation in Latin America, or possibly about the origins of the modern state in general. Is it legitimate to put it in these terms? Does this problem raise a more general question about the validity of the modern nation-state as a form of social organization? Should we then discuss not only a notion of citizenship but also introduce the problematization of the idea of *sovereignty* when addressing these issues?

5. Related to the previous point, are “juridification” and “judicialization” instances of the process of “legibility and simplification”, as James Scott put it in *Seeing Like a State*, a process which is part of the process of state formation in general? To quote Scott:

“How did the state gradually get a handle on its subjects and their environment? Suddenly, processes as disparate as the creation of permanent last names, the standardization of weights and measures, the establishment of cadastral surveys and population registers, the invention of freehold tenure, the standardization of language and legal discourse, the design of cities, and the organization of transportation seemed comprehensible as attempts at *legibility and simplification*.”⁸

8 SCOTT (1998) 2.

6. Along the same lines: Professor Villas Bôas states

“Le Roy (2013a) argues that land rights are the realization of different ways of thinking about space and social relations. It follows that, in order to understand the typicity of modern private property law, it is necessary to relate this invention to a ‘geometric representation’ of the space which, by measuring the surface, gives it a use value, an exchange value and introduces it into the market.”

The alternative seems to be respect for local uses concerning the structure of land tenure. But how do we reconcile this with standing legal orders and even the structure of every modern nation-state? Again, to quote James Scott:

“Imagine a lawgiver whose only concern was to respect land practices. Imagine, in other words, a written system of positive law that attempted to represent this complex scheme of property relations and land tenure. The mind fairly boggles at the clauses, sub-clauses, and sub sub-clauses that would be required to reduce these practices to a set of regulations that an administrator might understand, never mind enforce. [...] Indeed, the very concept of the modern state presupposes a vastly simplified and uniform property regime that is legible and hence manipulable from the center.”⁹

So, I guess my point here is that it might be highly productive to counterpose the issues of “juridification” and “judicialization” with Scott’s interpretation of the processes of “legibility” and “simplification” and their relation to modern processes of state building.

7. Professor Villas Bôas points out the ways in which “the ignorance and ethnocentrism of the ordinary jurist” in Brazil dealing with land issues end up working against the interests of indigenous peoples in Brazil. I am sure that this is also the case with Argentine jurists facing similar situations, but I wonder whether we are not asking too much of lawyers and judges that have been trained to uphold the law rather than to act as interpreters or legislators of a multicultural society. Should we address the issue of legal education in Latin America as part of the problem? Is the historiography of legal pluralism and empires (cf. Lauren Benton, for instance) a body of literature that jurists should be conversant with in order to approach the problem of juridification and the imposition of normative orders on indigenous communities?

9 SCOTT (1998) 35.

8. Should we consider that just as “the rhetorical use of the ‘Rule of Law’ can serve to ‘camouflage’ the plundering by Western capitalist countries”, the legitimate claims of indigenous groups can serve as camouflage for the opportunistic rent-seeking behaviour of many of them? How are we to treat such conduct if not from within the contours of our legal systems?

Needless to say, these observations should not be taken as criticisms of shortcomings in Professor Villas Bôas’ paper. On the contrary, I have found his text a very suggestive launchpad for a general discussion not only of the problems of “juridification” but, as I stated above, of more general questions of state formation and multicultural societies that attract the attention not only of jurists but of contemporary social scientists in general.

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The Juridification of Indigenous Claims in Latin America: Obstacles and Challenges

1 Introduction

In this article, we will comment on the document by Orlando Villas Bôas Filho entitled “Juridification and the Indigenous Peoples in Brazil”. The author, following Rodríguez Barón (2015), Dandler (2000), and Davis (2000), states that the increase in “normative inflation” is a verifiable phenomenon in the entire Latin American context. He recognizes that this process, also observable in the international context, would be the result of an increase in the expression and political influence of Indigenous movements in the Southern Hemisphere.

The author describes, from an anthropological and sociological approach, some fundamental aspects involved in the impact of juridification on Indigenous peoples in Brazil and his hypothesis is that this process involves “obstacles and challenges”, “false beginnings and persistent frustrations” for Indigenous peoples that have ultimately weakened the real impact of the Indigenous movement and its demands in the Brazilian context.

Bôas Fihlo criticizes jurists’ general tendency to conceive of juridification as a progressive process of guaranteed implementation that would only present positive dimensions. He concludes that “common legal sense” is unable to see the complex and ambivalent nature of juridification, and emphasizes how jurists can receive a precious contribution from anthropological and sociological approaches to overcome these barriers of understanding. According to the author, juridification is described as the imposition of an exogenous normativity on the Indigenous order, ignoring its traditional uses and forms of regulation which, according to Davis,¹ substantially differ from Eurocentric judicial systems. In a comparative analysis, the contrast between these normative orders is evident, revealing that juridification guarantees the hegemony of the Eurocentric/Western state legal

1 DAVIS (2000).

system. This is based on written documents, as opposed to the oral system that is typical of Indigenous forms of regulation of social life; developed by legal professionals, outlawing the ecology of knowledge that is desirable in a plurinational community, imposing legal processes against adversaries and decisions in which there are clear winners and losers, omitting alternative processes for conflict resolution. In conclusion, juridification takes place in a context of asymmetry of power that discriminates against Indigenous peoples and guarantees the rule of law as a strategy of political subordination and ‘plundering’ of these peoples to make their common goods available to capitalism and its power structures.

In principle, I must express my agreement with Professor Villas Bôas’s proposals regarding the impact that the hegemony of the law implies concerning Indigenous peoples when it is the result of a legal order that responds exclusively to the epistemological paradigms of the dominant culture of the colonialist type and is functional to the groups of power in excluding societies, as most countries of the continent have expressed. However, it is my opinion that this perspective – unlike the author’s – shows a dimension of the problem that does not shed light on the complexity of the phenomenon of juridification of Indigenous demands in Latin America. In this paper, I would like to propose, in contrast to what Villas Bôas said, that the increase in normative inflation related to the recognition of Indigenous rights is not reduced exclusively to the rule of law and the hegemony of a colonialist and contemporary capitalist order. The situation of the region in these matters reflects a diversity of political processes of different kinds that have been driven by Indigenous peoples and their demands for the juridification of their rights, raised as a counter-hegemonic strategy of the ethnic movement.² It has implied in some countries of the continent the re-foundation, more or less successful, of the modern capitalist colonial state,³ and the recognition of Indigenous peoples as a differentiated collective subject within the political community, with the right to self-determination and the maintenance of their institutions and legal systems, using the deconstructive potential of a properly liberal and hegemonic institution such as human rights.⁴

2 SANTOS (2010); BONDIA et al. (2011).

3 SANTOS (2010).

4 SANTOS (2010).

The scenario of the juridification of Indigenous rights in Latin America took its place in the constituent debate in the first phase during the democratic transition in the 1990s, including the recognition of Indigenous peoples and their specific collective rights in a multicultural society. Later, from the first decade of the 21st century onwards, the reconfiguration of the nation-state and its replacement by plurinational states took place. Plurinational states aimed precisely to end the colonial state, a concept constituted by a single nation whose cultural homogeneity is an artifice expressed in the loyalty of this group to the state project that gives it existence. At the level of the hegemonic empire of the positive law of the state, plurinationality provides a normative development that moderates the unrestricted rule of written law and promotes a normative order of legal pluralism.

From this perspective, the notion of juridification as a framework for the rule of state/colonial/positive law contrasts with the legal pluralism recognized in international law and the domestic law of many Latin American countries as a result of the Indigenous movement's demand for juridification of their rights. It omits the processes of re-foundation and decolonization of the state that have taken place in the continent and their specific complexities, advances, and frustrations.

Undoubtedly in Latin America, we face questioning of the legitimacy of the state-nation. In this struggle, "a counter-hegemonic use of hegemonic political instruments such as representative democracy, law, human rights, and constitutionalism" has been made explicit, as stated by Santos.⁵ In a similar line, Ferrajoli describes the phenomenon of globalization and pluralism, as an expression of the struggle between state legitimacy and the people to survive as a political subject in a plural state.

"Globalization is bringing out, precisely because of increasing world integration, the value of both differences and identities. Furthermore, it is revealing, sometimes explosively and dramatically, the artificial nature of states, especially those of recent formation, the arbitrariness of their territorial boundaries, and the unsustainability of their claim to subsume peoples and nations into forced units that deny differences as well as common identities. Thus the form of the state – as a factor of forced inclusion and undue exclusion of fictitious unity and division – has come into conflict with that of 'people' becoming a permanent source of war and threat to peace and the very right of self-determination of peoples."⁶

5 SANTOS (2010).

6 FERRAJOLI (2001 [1999]).

Under the new paradigm of ‘plurinationality’, it highlights the positive impacts of the international human rights framework in defining the rule of law, generating a new paradigm that includes under this principle the rights of Indigenous peoples and their legal systems. It also emphasizes that this concept provides people with suitable guarantees for making peace and fundamental rights effective, both those of individuals and peoples as a collective subject, concerning states.⁷

In Santos’s conception, plurinationality emerges as a critical requirement in the construction of the new democracy: “The moment when peoples, cultures, nationalities become visible on the national scene after centuries of opprobrium and exclusionism against them.”⁸ Plurinational democracy recognizes these actors, explicitly differentiated by their native past. They claim specificity in national society, not within a statute that grants them privileged attention as sub societies but in the progressiveness of their struggles and rights. They pose the same conditions within the state as nationalities, which result in Indigenous demands for self-government, territory, language, culture, justice, control of natural resources, and prior and informed consent to deliberate and decide on their affairs.⁹

The diversity of normative systems that converge in a context of legal pluralism arises as an expression of the coexistence of different social groups. It demonstrates that each one of them is organized according to its particular cosmovision and cultural patterns, regulating the social life of its members.¹⁰ The process of coexistence of regulatory systems has been characterized by the hegemony of those who exercise higher political power in the national states of Latin America; this has been represented by the state, the ruling classes and transnational corporations which, under the regulatory framework provided by globalization, have undermined the sovereign bases of those states.¹¹

However, social groups experience greater complexity by the increase of their members, resulting in diversification of their internal groups and/or by the interaction with other groups. These more complex groups give way

7 FERRAJOLI (2001 [1999]).

8 SANTOS (2008).

9 SANTOS (2008).

10 SÁNCHEZ (1998).

11 BONDIA et al. (2011).

to legal pluralism not only as a juridification process but also as a social reality.¹² Besides, social groups are intrinsically dynamic, adapting their cultural patterns and their different normative systems to the problems they have to face in different historical situations, contexts, and needs, according to the circumstances imposed by the expectations of each group or social subgroup and the interaction with others.¹³

In the international community, there is no state without a pluralistic social structure, and this is even more characteristic in Latin America due to the extensive presence of Indigenous peoples. Indeed, Latin America concentrates the most significant diversity of Indigenous peoples in the world, and the population is growing as a result of the processes of self-identification. According to the Economic Commission for Latin America and the Caribbean (ECLAC, 2014), the Indigenous population in Latin America grew by 49.3 % between 2000 and 2010. It is made up of 826 peoples, comprising 45 million people, representing 8.3 % of the total population.

Given this plurality and the conditions of subordination in which the continent's Indigenous peoples have lived in their relations with states, subject to the legal order and the hegemonic social, economic, and cultural model, there is no doubt that the democratization of our countries implies the recognition of pluralism in its most solid expression. In the normative field, this diversity, as Cabedo rightly states, is reflected in the enforcement of Indigenous law and its necessary coexistence with state law. It gives rise to legal pluralism and imposes the need to articulate or coordinate both jurisdictions¹⁴ under the paradigm of self-determination and respect for fundamental rights as Ferrajoli and Santos propose.¹⁵ These notions favor a process of deconstruction of the Eurocentric cultural homogeneity of the state-nation and the hegemonic processes of colonial roots that sustain it, in order to build an environment of diversity and pluralism that favors a properly democratic intercultural dialogue.

In other articles we have argued, following Rouland and others, that

“[the] challenge presented by legal pluralism is to validate the different ways in which normative systems interrelate to regulate social behavior at the same time and place and, in parallel, to settle a persistent dichotomy between equality and/or

12 DAVID (1968).

13 BERTINI/YÁÑEZ (2013).

14 CABEDO MALLOL (2012).

15 FERRAJOLI (2001 [1999]); SANTOS (2008, 2010).

domination. Indeed, the question of legal pluralism has historically been addressed in different ways, such as relations of extermination or exclusion, assimilation or integration, and finally, the peaceful coexistence of different legal systems in a context of recognition of the right to self-determination of peoples.”¹⁶

Although in modern times the homogenization policy of the dominant legal system has prevailed, the reality shows the persistence of several normative models among the social groups that share the same political community.¹⁷

Together with Bertini, we follow Eugene Ehrlich in this approach, who refers to juridical pluralism as a spontaneous process that arises from the convergence of different normative orders parallel to the state, which he calls “living law”, emanating from custom and nourished by popular legal consciousness as a form of self-regulation.¹⁸ In this same line Bobbio expresses himself, who notes that as there is an organized social group, there is a legal system which questions the hegemonic conceptions that consider as right only the norms and institutions belonging to the state legal system.¹⁹ Following this approach, we have argued that “law is not determined by the notion of a legal norm, but rather by each legal system, and its validation – of the legal norm – is not related to recognition by other systems, but rather each legal system develops independently within its sphere and has autonomy”.²⁰

However, when different social groups are interrelated and interdependent, even in a context of colonization or globalization, it is necessary to identify the most appropriate legal and political mechanisms for intercultural dialogue. This includes institutional instruments that guarantee respect for the differences of all nationalities that converge in the political community, the preservation of their respective civilizing projects, and the legal systems through which they regulate their social relations and organize their societies. Plurinationality as a model of state and legal pluralism is fundamental to guaranteeing the subsistence of these peoples in the current historical situation, and also to providing legitimacy to the state. The above becomes relevant if we consider that the self-determination of Indigenous peoples seems to be projected mostly, although not exclusively, within plurinational states and

16 ROULAND et al. (1999), quoted in BERTINI/YÁÑEZ (2013).

17 BERTINI/YÁÑEZ (2013).

18 EHRLICH (2002 [1913]).

19 BOBBIO (1992).

20 BERTINI/YÁÑEZ (2013).

not outside them. On the other hand, plurinational states cannot survive without their diverse peoples maintaining loyalty to the extended political community in which they are integrated and in which they live. This framework imposes on the state and the peoples the need to live together within more global orders, in conditions of equality and where an intercultural interpretation of certain value distinctions for coexistence is allowed.²¹

Because of the above, from the 1990s and into the first decade of the 21st century, a new horizon opened up for plurinationality and legal pluralism in most Latin American countries; the challenge of articulating Indigenous regulatory models and the state legal order arose, guaranteeing respect for the collective rights of Indigenous peoples, their cultural characteristics, and the epistemological bases that sustain them, while safeguarding state unity and respect for the human rights contained in international treaties and constitutional.²²

2 The challenges of legal pluralism in Latin America

Since the implementation in Latin America of international treaties on human rights, and in particular Convention 169 on Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization (ILO), Convention 169 has allowed, to a greater or lesser extent depending on the normative density and the strength and autonomy of democratic institutions in the countries, the practice and enforcement of Indigenous law, in such a way that these legal systems transcend the borders of Indigenous societies. In this way, normative contents, rules, and procedures are known, and can be invoked as a counter-hegemonic right to the state legal order.²³

In practice, legal pluralism poses challenges. Martínez and other authors point out that the coexistence and implementation of the programmatic and normative precepts that make up Indigenous peoples' law and state law generate difficulties. On the one hand, this expresses the irrefutable fact that the coexistence of diverse cosmovisions and values entails social, political, and

21 BONDIA et al. (2011).

22 SIEDER (2006); SANTOS (2008, 2009, 2010); VALLADARES (2009); ALBÓ (2010); SIERRA (2010); BONDIA et al. (2011).

23 MARTÍNEZ et al. (2012).

economic conflicts, exacerbated by the historical burden of colonial relations; on the other hand, plurinational states face the task of redefining their democracies within the framework of internationally recognized Indigenous rights, legal pluralism, and the maximization of Indigenous autonomies.²⁴

Human rights have contributed to the legal validity of legal pluralism in Latin America. In this same line, the option for legal pluralism in domestic law was taken up in the constitutional reforms adopted in the 1990s after the end of dictatorial regimes, and more solidly in the Constitutions of Ecuador (2008) and Bolivia (2009), where plurinational states were configured. In this process of legal pluralism *constitutionalization*, with greater or lesser force, the conceptions of the nation-state and legal monism that have prevailed in our republican history are beginning to be demolished.

The same authors mentioned in the preceding paragraphs maintain that the flow of information favors intercultural dialogue in a context of legal pluralism, where the state can better perceive the virtues of Indigenous institutions to more effectively resolve social conflict. Likewise, it can influence the government of Indigenous peoples who incorporate human rights as parameters of intercultural coexistence.²⁵

The analysis reveals an unresolved problem regarding the supremacy of human rights over the uses and customs of Indigenous peoples, and I would like to take this up. The truth is that human rights act as a limit to the sovereignty exercised by states, Indigenous peoples, or citizens. This limit acts as an irreplaceable rule of democratic coexistence. However, this requires that the exercise of intercultural dialogue be nuanced by agreeing on minimum standards. Such is the case of the paradigm referred to the minimization of restrictions and maximization of the autonomy principle,²⁶ developed by the Colombian Constitutional Court and which indicates that the legal minimums that act as a material limit to Indigenous jurisdiction are: the right to life, to physical and psychological integrity, and to due process.²⁷

In this scenario, legal pluralism also implies obligations for states that stem from the material limit (the legal minimum) imposed by human rights and that require them to define the areas of competence and the scope of the

24 MARTÍNEZ et al. (2012).

25 MARTÍNEZ et al. (2012).

26 Constitutional Court of Colombia. Ruling T-349/96.

27 Constitutional Court of Colombia. Ruling T-349/96.

exercise of collective rights that Indigenous peoples have, by constitutional, legal, or jurisprudential means. It includes the delimitation of the powers reserved for Indigenous peoples on their affairs, within a framework of self-determination (maximization of autonomy).

From the above, the conclusion is that Indigenous peoples, under their status as peoples, exercise powers as collective subjects that – before the constitutional implementation of Indigenous rights in the continent – were reserved exclusively for the national state. In this new context, where states are reconfigured as plurinational and allowing for legal pluralism, Indigenous peoples validly exercise powers and competencies in their territories that had been appropriated by the state.

In the current circumstances, this juridification of legal pluralism results in the Indigenous peoples becoming part of the constitutional pact. Actually, this has been evident in the political processes on the continent that led to constitutional reformulation, particularly those in Ecuador and Bolivia in the first decade of the 21st century.

One area of tension expresses itself in the administration of justice. The effectiveness of Indigenous jurisdictions results from the horizontality of the relations between the parties and the level of their institutions, which allows to agree on procedures and to bring positions closer together, favored by a common language, values and shared culture, and full access to the authorities in charge of administering justice.²⁸ This does not mean that Indigenous justice is free from omissions, abuses, and excesses, and there are mechanisms for coordination with the state to bridge these gaps, especially when Indigenous peoples themselves remove their affairs from traditional jurisdictions because they feel that the justice system itself does not sufficiently guarantee their rights and interests, and they turn to coordination mechanisms to define the outlines of state and Indigenous justice. The rules of coordination condition the subsistence of Indigenous legal systems within a framework of respect for human dignity and human rights, so that voices and views converge from that normative diversity that imposes legal pluralism.²⁹ We agree with Padilla that “the challenge generated by legal pluralism for society, peoples, and the state is one of coordination, dialogue,

28 Constitutional Court of Colombia. Ruling T-349/96.

29 Constitutional Court of Colombia. Ruling T-349/96.

delimitation, and resolution of possible jurisdictional and substantive law conflicts”.³⁰ Notwithstanding the above, the potential risks of coordination mechanisms are what is called danger of “*forum shopping*” or “forum of convenience”,³¹ which implies that if individuals can back out of Indigenous jurisdiction according to their convenience, the result would inevitably lead to a weakening of community cohesion and Indigenous autonomy. These risks must be foreseen and regulated by coordination laws, whose ultimate goal should be the establishment of a pluralist legal system, where both Indigenous and state justice are guarantors of comprehensive, plural, and intercultural justice.

3 Scope of constitutional recognition of legal pluralism

The recognition of differentiated citizenship that provides constitutional rights to Indigenous peoples dates, as we have pointed out, from the constitutional reform processes that took place in the region after the dictatorial governments; concerning legal pluralism, these moved from a weak recognition to a more solid one, as it happens with those constitutions that have consecrated a state of a plurinational character. This process expressed itself with differences in the various countries of the Americas but, with the sole exception of Chile, all were permeated by legal pluralism recognizing Indigenous peoples’ autonomous powers as far as the law was concerned.

The Constitution of Colombia (1991) recognizes and protects the ethnic and cultural diversity of the Colombian nation (Article 7) and explicitly recognizes legal pluralism by providing that the authorities of Indigenous peoples may exercise jurisdictional functions within their territorial scope, under their own rules and procedures, provided that these are not contrary to the constitution and laws of the Republic (Article 246). It provides that international treaties ratified by Colombia constitute the normative framework for the interpretation of the rights and duties enshrined in the constitution (Article 93).

In various articles the 1994 Constitution of Peru “recognizes and protects the ethnic and cultural plurality of the nation” (Article 2, number 19); it establishes the right to the cultural identity of the peasant and Native com-

30 PADILLA RUBIANO (2012).

31 REINOSO BARBERO (2009); COHEN (2010).

munities, and to their legal existence, legal status, and autonomy within the law (Article 89). Concerning legal pluralism, it provides that the authorities of the peasant and Native communities, with the support of the Peasant Patrols, may exercise jurisdictional functions within their territory under customary law, provided that they do not violate fundamental human rights (Article 149); and finally, it enshrines a rule similar to that established in the Constitution of Colombia, in that it provides that “the rules relating to the rights and freedoms recognized by the Constitution shall be interpreted following the Universal Declaration of Human Rights and with the international treaties and agreements on the same matters ratified by Peru.”

In Ecuador, the constitution adopted in 2008 reconfigures the State as a constitutional state of rights, of a unitary, intercultural, and plurinational type (Article 1). It recognizes – among others – the rights of Indigenous peoples to freely maintain, develop, and strengthen their identity, sense of belonging, ancestral traditions, and forms of social organization; their generation and exercise of authority, in their legally recognized territories and community lands of ancestral possession; their ability to create, develop, apply, and practice their own or customary law (Article 57 numbers 1, 9, and 10). Article 171 on legal pluralism recognizes that the authorities of Indigenous communities, peoples, and nationalities shall exercise jurisdictional functions, based on their ancestral traditions and their rights, within their territories, with guarantees of participation and decision-making by women. These authorities shall apply their own rules and procedures for the settlement of their internal disputes, provided that they do not violate the constitution and the human rights recognized in international instruments. The State shall guarantee that public institutions and authorities respect the decisions of the Indigenous jurisdiction. Such decisions, like state decisions, shall be subject to the control of constitutionality. The law shall establish mechanisms for coordination and cooperation between the Indigenous jurisdiction and ordinary jurisdiction. It establishes that individuals, communities, peoples, nationalities, and groups are holders and shall enjoy the rights guaranteed by the constitution and international instruments (Article 10).

In Bolivia, the Constitution of 2009 declares that Bolivia is constituted as a Unitary Social State of Plurinational Community Law based on political, economic, legal, cultural, and linguistic pluralism and plurality, within the integration process of the country (Article 1). It recognizes Indigenous peoples’ right to autonomy, self-government, culture, recognition of their insti-

tutions, and consolidation of their territorial entities, under the constitution and the law (Article 2). It establishes that one of the essential purposes and functions of the State is to reaffirm and consolidate plurinational diversity (Article 9, No. 3). Legal pluralism is enshrined in Articles 190 and subsequent articles in the following terms. Article 190 recognizes legal pluralism, providing that Indigenous Native peasant nations and peoples shall exercise their jurisdictional and competent functions through their authorities, and shall apply their principles, cultural values, norms, and procedures. The Native Indigenous peasant jurisdiction respects the right to life, the right to defense and other rights, and guarantees established in this constitution. In this connection, Article 191 provides that the Indigenous and Native peasant jurisdiction is based on a special bond between the people who are members of the respective Indigenous and Native peasant nation or people.

The Native Indigenous peasant jurisdiction exercises its authority in the personal, material, and territorial sphere: members of the Native Indigenous peasant nation or people are subject to this jurisdiction, whether they act as actors or defendants, complainants or plaintiffs, accused or defendants, appellants or respondents. This jurisdiction deals with Indigenous Native peasant issues under the provisions of a Jurisdictional Boundary Act. This jurisdiction applies to the legal relations and events that take place or whose effects occur within the jurisdiction of Indigenous Native peasant people (Article 192). Any public authority or person shall abide by the decisions of the Native Indigenous peasant jurisdiction. In order to comply with the decisions of the Indigenous Native peasant jurisdiction, its authorities may request the support from the competent state bodies. The State shall promote and strengthen Indigenous Native peasant justice. The constitution instructs a Jurisdictional Boundary Act to determine the mechanisms for coordination and cooperation between the Indigenous Native peasant jurisdiction with the ordinary jurisdiction and the agri-environmental jurisdiction and all constitutionally recognized jurisdictions. The Constitution of Bolivia requires respect for and compliance with the mandates established in the treaties and conventions ratified by the Plurinational Legislative Assembly, as well as the interpretation of the duties and rights enshrined in the constitution according to these normative instruments (Article 12 No. IV).

In the case of Brazil, the constitution has been a precursor in recognition of Indigenous rights. The rights of Indigenous peoples are outlined in a specific chapter of the 1988 Charter, title VIII, “Of the Social Order”, chapter VIII, “Of

the Indians”. According to Article 231 of the constitution, “Indigenous peoples are recognized as having their social organization, customs, languages, beliefs and traditions, and the original rights to the lands they traditionally occupy, and it is incumbent upon the Union to delimit them, protect them and ensure respect for all their property.” I will specifically focus on the analysis of territorial rights, where the Brazilian Constitution has the most significant innovations. The new constitution recognizes the rights of Indigenous peoples to the lands they traditionally occupy, explaining that these are native, i. e. pre-existed at the formation of the State itself and that they existed independently of any official recognition.

Article 231, paragraph 1, of the constitution itself defines the concept of Indigenous lands and gives it constitutional protection:

“The lands traditionally occupied by the Indigenous people are those inhabited by them permanently, those used for their productive activities, those essential for the preservation of the environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs, and traditions.”

As can be seen, the Brazilian Constitution recognizes territorial rights and confers validity on their Indigenous right as the basis for the constitution of such rights.

4 Legal pluralism: the normative and interpretative framework provided by international human rights law with emphasis on territorial rights

Convention 169 regulates the application and enforcement of Indigenous law itself in Articles 8 to 12. These rules impose an obligation on the state to respect Indigenous customary law, providing that Indigenous customs or customary law should be considered when applying national legislation. It also recognizes the right of Indigenous peoples to retain their customs and institutions, provided that these are not incompatible with human rights as defined in national and international legal systems. Faced with potential legal conflicts arising from the rules and principles overlapping in a context of legal pluralism, the obligation to establish procedures for resolving conflicts arises, a question which, as we shall see below, is mostly about the pre-eminence of Indigenous own or customary law.

Concerning the administration of Indigenous justice in the area of sanctions, Convention 169 provides that, to the extent that this is compatible with the national legal system and internationally recognized human rights, the methods traditionally used by Indigenous peoples for the repression of crimes committed by their members should be respected. On the other hand, state authorities and courts called upon to rule on criminal matters involving people of Indigenous origin must consider their economic, social, and cultural characteristics.

The law itself also operates as a normative basis for the recognition of Indigenous property and possession rights over the lands they traditionally occupy, and incorporates the notion of Indigenous ownership according to the epistemological paradigms proper to it. Thus, it is established in Articles 13 to 19 of Convention 169, which impose on states the obligation to institute appropriate procedures within the national legal system to resolve land claims made by the peoples concerned, safeguarding the special relationship of Indigenous peoples with their lands and territories, which constitute the basis of their ethnic identity.

Article 14 of Convention 169 explicitly recognizes the property and possession rights over the lands traditionally occupied by Indigenous peoples. The interpretation that the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has made of Article 14 of Convention 169 mentioned in the previous paragraph and which has legal force conferred on it by the fact that it configures the reliable treaty interpretation, has determined that the property and possession rights this article deals with not only refer to those lands on which Indigenous peoples have legal ownership, but also to those of ancestral property, even if they do not have title to them.

Indeed, the CEACR ruled that the basis for the establishment of Indigenous peoples' land rights is traditional occupation and use, and not the eventual official legal recognition or registration of land ownership by states, arguing that traditional occupation confers the "right to land under the Convention whether or not such a right has been recognized [by the state]".³²

Similarly, the CEACR established that the right through the occupation of land is a guiding principle of the Convention, which recognizes that ancestral

32 International Labour Conference, CEACR 2003, 73rd session, Observation, Peru: paragraph 7.

occupation is the source of Indigenous peoples' property rights and imposes an obligation on states to generate adequate procedures for its implementation. The CEACR comments on this matter in the following terms:

"If Indigenous peoples were unable to assert traditional occupation as a source of property and possession rights, Article 14 of the Convention would be emptied of its content [...]. The Commission is aware of the complexity of implementing this principle in legislation, as well as designing appropriate procedures. However, it stresses at the same time that the recognition of traditional occupation as a source of property rights and possession through an appropriate procedure is the cornerstone of the land law system established by the Convention. The concept of traditional occupation could reflect in different ways in national legislation, but it must be applied."³³

The concept behind these regulations, as noted by UN rapporteur James Anaya, is that Indigenous peoples "have the right to an ongoing relationship with the lands and natural resources following their traditional patterns of use and occupation".³⁴ Such occupation must be related to the present in order to confer the right of ownership and possession. However, this relation implies keeping a link even with those lost lands, or in other words lands from which Indigenous people have been displaced, as long as a continuous cultural relationship is maintained with them, especially if they have been removed from the Indigenous domain in recent times.³⁵ The obligation imposed on states to implement appropriate procedures within the national legal system to resolve Indigenous peoples' land claims is timeless and therefore applicable to claims arising from the remote past.³⁶

In line with the ILO's interpretation, the Universal Declaration on the Rights of Indigenous Peoples explicitly recognizes the right to own, use, develop, and control not only the lands but also the territories and resources they possess because of traditional ownership and other traditional occupations.³⁷ Furthermore, it establishes that Indigenous peoples have the right to have the lands, territories, and natural resources that they traditionally owned or occupied returned to them and/or compensated when they are confiscated or taken without their consent.³⁸

33 International Labour Conference, CEACR 2009, 742.

34 ANAYA (2005).

35 ANAYA (2005).

36 ANAYA (2005).

37 Article 26.1, United Nations Declaration on the Rights of Indigenous Peoples.

38 AYLWIN et al. (2014).

The IACHR has consolidated its jurisprudence in this area, following the reliable interpretation formulated by the bodies implementing Convention 169, as well as those of the provisions of the United Nations Declaration on the Rights of Indigenous Peoples, by recognizing that the right of ancestral communal property of Indigenous peoples over their lands confers full ownership. This is an evolutionary interpretation of the right to private property enshrined in the American Declaration and Convention, under Indigenous epistemology in the area of property. Thus, in the case of *Awas Tingni v. Nicaragua* (2001), the IACHR recognized, in light of Article 21 of the American Convention, the communal property rights of Indigenous peoples over land.³⁹ It also recognized the validity of land tenure based on Indigenous custom as a basis for ownership, even in the absence of a title, and the need for the close relationship that Indigenous people have with their lands to be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity, and economic survival.⁴⁰ The court extended property protection based on Article 21 of the American Convention on Human Rights to occupation based on Indigenous customary law.⁴¹

Concerning the validity of customary law, the IACHR notes “[the] customary law of Indigenous peoples must be especially taken into account for the purposes in question. As a result of tradition, possession of land should be sufficient for Indigenous communities without real title to land to obtain official recognition of their ownership and registration.”⁴² Thus, the Inter-American Human Rights System recognizes property derived from traditional or customary patterns of use and possession, generated by Indigenous peoples themselves.⁴³

39 IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, 148–149.

40 IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, 151.

41 IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, 149; IACHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 118, and *Case of the Saramaka People*. Suriname, para. 90. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, 88.

42 IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, 151.

43 ANAYA (2005) 204.

In subsequent years, the IACHR has confirmed its interpretation on the matter in several judgments. It is worth noting the jurisprudence of the IACHR that recognizes the communal rights over their ancestral lands of the Yakye Axa, Sawhoyamaka, and Xákmok Kasek communities in Paraguay.⁴⁴ The IACHR accepted the claim of these communities for the violation of ancestral collective property rights based on Article 21 of the American Convention (in addition to the violation of the right to life, personal integrity, the rights of the child, judicial protection, and juridical personality). It also expressed its opinion on the persistence over time of property rights over the ancestral lands of Indigenous peoples when they have lost possession of these lands because they were displaced from their ancestral territories without their consent or against their freely expressed will.

In its judgment in the Sawhoyamaka case, the IACHR held that the right to claim ancestral lands claimed by Indigenous peoples did not extinguish as long as they maintained their relationship with those lands, whether material or spiritual.⁴⁵

In recent judgments, the IACHR has ruled on the case that Indigenous peoples have involuntarily lost possession of their lands, recognizing that they maintain the right of ownership, unless they have been transferred to third parties in good faith:

“(3) members of Indigenous peoples who have left or lost possession of their traditional lands through no fault of their own maintain the right of ownership over those lands, even in the absence of a legal title, except where the lands have been legitimately transferred to third parties in good faith, and 4) members of Indigenous peoples who have involuntarily lost possession of their lands, and these lands have been legitimately transferred to innocent third parties, have the right to recover these lands or to obtain other lands of equal size and quality.”⁴⁶

If the Indigenous peoples are in full possession of their territory, the standards set by the IACHR are: “in the case of *Mayagna (Sumo) Awas Tingni v. Nicaragua*, the court noted that states must guarantee the effective owner-

44 IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125; IACHR, *Sawhoyamaka v. Paraguay*, 2006; IACHR, *Xákmok Kásek v. Paraguay*, 2010.

45 Thus the court states that “as long as this relationship exists, the right to claim will remain in force.” IACHR, *Case of Sawhoyamaka v. Paraguay*, 2006, 131.

46 IACHR, *Case of the Garifuna Community of Punta Piedra and its Members with Honduras*, 2015, 172.

ship of Indigenous peoples and refrain from acts that could lead agents of the state itself, or third parties acting with their acquiescence or tolerance, to affect the existence, value, use, or enjoyment of their territory. In the case of the *Saramaka People v. Suriname*, it stated that states must guarantee the right of Indigenous peoples to effectively control and own their territory without any external interference from third parties.

In the *Sarayaku Case of the Indigenous Kichwa People of Sarayaku v. Ecuador*, it ruled that states must guarantee the right of Indigenous peoples to control and use their territory and natural resources.⁴⁷

Along these lines, the IACHR has ruled that the administrative processes of delimitation, demarcation, titling, and sanitation of Indigenous territories are mechanisms that guarantee legal security and effective protection of the right to property. However, if this process results in a collision of rights between the territorial rights of Indigenous peoples and third parties, to clarify the state's obligation the IACHR has established criteria for the assessment of rights,⁴⁸ an obligation that otherwise corresponds exclusively to the state as a guarantor of the right.⁴⁹

In 2018 in a case involving Brazil, the court noted that:

“when there are conflicts of interest in Indigenous claims, or when the right to collective Indigenous property and private property enter into real or apparent contradictions, one must assess on a case-by-case basis the legality, necessity, proportionality, and the achievement of a legitimate objective in a democratic society (for the public utility and social interest), to restrict the right to private property, on the one hand, or the right to traditional lands, on the other, without limiting the latter or implying of the latter a denial of its subsistence as a people.”⁵⁰

In order to adequately carry out the assessment considering the specificities of Indigenous rights concerning their territories, two additional standards are provided that the state should take into consideration when fulfilling this

47 IACHR, *Case of the Garifuna Community of Punta Piedra and its Members with Honduras*, 2015, 172.

48 IACHR, *Case of the Yakye Axa Indigenous Community with Paraguay*, 144, 146; IACHR, *Case of the Kaliña and Lokono Peoples v. Suriname*. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, 155.

49 IACHR, *Case of the Sawhoyamaya Indigenous Community with Paraguay*, Judgment, 2007, 136; IACHR, *Case of the Kaliña and Lokono Peoples with Suriname*, 156.

50 IACHR, *Case of the Xucuru Indigenous People and their members v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 5, 2018. Series C No. 346, 125.

obligation: first, the special relationship that Indigenous peoples have with their lands;⁵¹ second, that any limitation on the right of Indigenous peoples to their traditional lands shall not imply the denial of their subsistence as peoples.⁵²

It should be noted that this assessment judgment⁵³ was considered necessary and useful in the process of recognition, demarcation, and titling of Indigenous peoples' territorial rights except when domestic law established the pre-eminence of the right to Indigenous collective property over private property. In the case we analyzed involving the state of Brazil with the Xucuru people and its members, it provided that the assessment is not necessary when domestic law gives pre-eminence to the right to collective property over the right to private property, making the rights of Indigenous peoples prevail over bona fide third parties and non-Indigenous occupants. Moreover, the state has imposed on itself the constitutional duty to protect Indigenous lands.⁵⁴

In a recent ruling, the IACHR explained that "Indigenous peoples have the right to own their territory without any external interference from third parties."⁵⁵ It specifies that titling and demarcation must involve the peaceful use and enjoyment of property,⁵⁶ which implies that the right to Indigenous collective property must be free from interference from the state and third parties, including bona fide third parties, even when they belong to vulnerable groups that depend on the land for their subsistence.

51 IACHR, Case of the Yakyé Axa Indigenous Community with Paraguay, 2005, 146; IACHR, Case of the Kaliña and Lokono Peoples with Suriname, 2015, 156.

52 IACHR, Case of the Yakyé Axa Indigenous Community v. Paraguay, 2005, 143; IACHR, Case of the Kaliña and Lokono Peoples with Suriname, 2015, 155; IACHR, Case of the Xucuru Indigenous People and their Members with Brazil, 2018, 125.

53 IACHR, Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008. Series C No. 177, 51; IACHR, Case of Mémoli v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 22, 2013. Series C No. 265, 127.

54 IACHR, Case of the Xucuru Indigenous People and their Members with Brazil, 2018, 127.

55 IACHR, Case of the Indigenous Communities Members of the Lhaka Honhat Association v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 6, 2020, 98.

56 IACHR, Case of the Indigenous Communities Members of the Lhaka Honhat Association v. Argentina, 96.

5 Conclusions

Legal pluralism as a result of the *juridification* of Indigenous demands in Latin America, expressed in the development of international law in the field of Indigenous rights and constitutional reforms, has implied the pre-eminence of Indigenous customary or own law as the basis for the exercise of their rights.

Customary law and the empowerment of Indigenous authorities to exercise jurisdiction over territories has allowed them to not only resolve their internal disputes according to their own normative and conflict resolution orders, but also to resolve conflicts with the state or with third parties such as land and territory disputes, rethinking the epistemological bases of property law, which is fully reflected in the jurisprudence of the IACHR, including for the case of Brazil.

I agree with the author that this progressive process of implementing legal guarantees not only has positive dimensions but also presents challenges and obstacles that are difficult to overcome. These obstacles are expressed in the persistence of power asymmetry in which Indigenous peoples find themselves concerning the state and national and transnational interest groups and the unresolved colonialism in the region. However, the dispute for the right expressed in the pre-eminence of Indigenous law itself and the judicialization of these disputes has opened a counter-hegemonic path for Indigenous claims that relativizes the statements contained in the paper that *juridification* only creates negative effects for the Indigenous cause. The juridification of Indigenous rights in Latin America reveals tremendously diverse and complex political and legal processes where Indigenous peoples have used the state legal order for counter-hegemonic purposes by fighting for the deconstruction of the hegemonic legal system and its institutions – even bringing into the constitutional debate the re-founding of the state-nation and its replacement by a plurinational state.

Finally, it seems important to me to specify that, as we have sustained in this document, the *juridification* of Indigenous rights has not necessarily resulted in the imposition of a state legal order; on the contrary, it has meant the validation of Indigenous law itself as a rule for the adjudication of rights. Indeed, it has generated a trend – with nuances, of course – that seeks to replace legal monism with legal pluralism. In the case of Brazil, this has been clearly stated in the cases analyzed in this article in which the state has been

condemned by the IACHR and has been required to recognize Indigenous ancestral property, and guarantee the territorial rights of these peoples following the American Convention on Human Rights provisions, and at the domestic level in Article 231 of the constitution.

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Third Part

Legal Frameworks

Section I

The Constitutional Embedding of Differences

The Constitutional Embedding of Differences: Chile (1810–1980)

1 Introduction

The problematic relationship between law and diversity can be attributed to a fundamental incommensurability that exists among different loci of structured observation in contemporary society. These problems did not exist for the *ancien régime* society which operated on assumptions of natural unity and difference. This construction of unity and difference was based on the unity and indivisibility of God and the order he gave his Creation, while difference was sustained through the image of the body and the harmony achieved by the necessary diversity and autonomy of its organs.¹ This world-view thus presupposed the existence and the necessity of hierarchies and inequalities, and the function of law was to sustain these differences through status and privilege, which were seen as the place occupied by these persons in the natural order.² Early modern juridical culture thus functioned under the conception that what existed in the world had to have a correlate in the juridical realm: social differences considered to be natural were thus understood through diverse *iura singularia* or *privilegia*, giving groups of persons or social circumstances a defined correlate in the juridical sphere.³

The reorganization of law around the principle of equality in the 18th century, however, meant that law could no longer recognize differences that were not produced by law itself. Social categorizations hitherto considered to be natural were replaced with the abstract principle of equality before the law, which created a fracture between socially and legally relevant differences. The principle of equality enshrined in many constitutions of the 18th and 19th centuries eroded the relative commensurability between societal and juridical dif-

1 HESPANHA (2016) 71.

2 HESPANHA (2008) 26–28.

3 DUVE (2007).

ference. The fixing of differences through privileges was replaced principally with legal distinctions that no longer necessarily corresponded with social differences outside of law. In the newly founded Latin-American republics, for example, the indigenous condition and the condition of women were differences no longer observable to law. This does not mean that these differences ceased to exist; but rather that they had to be considered solely in terms of the distinctions relevant to the legal system (citizen/non-citizen; owner/non-owner; buyer/seller; and so on). Seen in this way, the question of diversity becomes necessarily more complex because diversity within law no longer corresponds with diversity in society. This fracture is at the root of contemporary demands on law for increased awareness of social, racial, ethnic, linguistic, and sexual diversity. The heightened awareness of contemporary legal discourse as to the problem of diversity is nothing more than a reflection of the way society is revealing these silences and blind spots of the legal system.

This contribution takes these tensions between different forms of societal observation of diversity to rethink the problem of difference in the Chilean constitutions from 1810 to 1980. Seen from this perspective, the historical evolution of constitution-making can be seen, beyond its claims to formal equality, as a continuous process of constructing legal difference. Thinking about difference and the constitution poses methodological and even epistemological problems that are not easily solved. On the one hand, there is the question of sources and how the legal historian is supposed to see that which has been rendered invisible in the legal codes. The second problem runs deeper, and it refers to the assumption that there is an objective reality which, if accurately scrutinized, will reveal groups of people neglected by law. Elsewhere, I have examined the methodological and epistemological questions that arise from looking for diversity, or the absence thereof, in law.⁴ In this contribution, I should like to take another route by reflecting on how various forms of difference were constructed in 19th- and 20th-century Chile. In the first section, I shall illustrate how categories of difference were constructed or concealed through population registers and censuses. I shall endeavor to illustrate how widely different categories of racial, ethnic, or national adscription were applied to relatively similar social situations, and

4 BASTIAS SAAVEDRA (2020).

then reflect on what this means in terms of the difference that the (legal) historian can effectively detect through the sources. In the following section, I shall focus on the differences constructed through Chilean constitutions from 1810 to 1980. This does not attempt to be a comprehensive survey; it seeks only to illustrate how, despite the semantics of equality traditionally associated with it, the constitution actually sustained and reinforced many differences.

2 Counting people: constructing and concealing differences

The census is a good point of departure since it demonstrates the difficulties posed by counting ‘population’. Even though the persons who were charged with counting began with the assumption that, through this procedure, they were merely producing a representation of reality, the process of creating censuses implied a process of serialization, standardization, stabilization of differences, complexity reduction, and disaggregation. “In the census form, reality and discourse intersected almost immediately. The form allowed reality to enter the realm of words and numbers, but it functioned as a gate, keeping out many aspects that were of no interest to administration.”⁵ Census taking was therefore not simply a process of counting people living in a given territory, but rather its very operation constructed the population according to certain arbitrary categories which were functional to government.

The variation in social categories represented in the Chilean censuses since the late 18th century is illustrative of this situation. General population counts were not common during the colonial period, but provinces and bishoprics usually kept some sort of register of their population for the purpose of tribute and tithe collection. One count made by the Bishopric of Santiago in 1778 that also included the province of Cuyo, then under the jurisdiction of the government of Chile, counted the population as follows: white: 190,919; mestizos: 20,650; Indios: 22,568; blacks: 25,508.⁶ These categories were, however, less stable than we may think since other population counts followed different distinctions. On taking possession of his posi-

5 GÖDERLE (2016) 78.

6 Quoted by SILVA CASTRO (1953) VII.

tion as Intendant of the province of Chiloé in 1784, Francisco Hurtado was given the order to create “an exact general register and census of all the inhabitants of those islands, with a clear account of the towns they belong to and distinguishing between the sexes”.⁷ Hurtado’s register was as follows:

Castro:

Spaniards 10,035

Indios 8,750

Chacao:

Spaniards 3,107

Indios 1,474

Calbuco:

Spaniards 1,934

Indios 1,403

A register of the Bishopric of Concepción in 1812 again provided different categories, distinguishing between men, women and children, according to sex, and counted ‘Spaniards’, ‘Indians’, and ‘mestizos, blacks and mulattos’. The latter were counted in the same category. This register additionally counted the ‘infidels in missions’ and the ‘infidels in the whole territory’.⁸ The ‘infidels’ counted by this census were most probably the *Wentche*, the *Nagche*, or the *Lafkenche*, the autonomous indigenous sub-groups inhabiting the region adjacent to the province of Concepción.

The first national census was attempted in 1813. Here, men and women were divided according to their marital status (single, married, widower). It should be noted that, as in other Catholic countries, divorce and separation were not available options. The census form also divided age groups into five cohorts (1–7; 7–15; 15–30; 30–50; 50–100) and provided space for including the profession. Finally, it contemplated distinctions of ‘origin and caste’ as follows: American Spaniards; European Spaniards; Asian, Canarian, and African Spaniards; foreign Europeans; Indios; mestizos; mulattos; and blacks.⁹ The 1835 census did not use any kind of ethnic, racial, or national distinction, enumerating only the population of single and married men and

7 SILVA CASTRO (1953) VII–VIII.

8 Un censo del obispado de Concepción en 1812 (1916) 266–267.

9 EGAÑA (1953).

women.¹⁰ The 1865 census constructed quite different categories: Sex, age, marital status, literacy, nationality, and ‘physical or moral’ disability.¹¹ The 1875 census asked about the parish the individual belonged to and distinguished between urban and rural dwellings.¹² The 1885 census did not include these items, but attached a new one on primary education to the question on literacy in addition to a question on vaccination.¹³

Through the way they counted, population registers and the census were suggesting that certain differences were more or less relevant. Until 1813, for example, ethnic or racial categorizations were the most prominent way of making distinctions. Thereafter, we find other forms of difference: man/woman; profession; single/married/widower; able-bodied/disabled; literate/illiterate; national/foreigner; urban-dweller/rural-dweller; vaccinated/unvaccinated. Of course, not all of these differences were completely relevant to the everyday life of the population surveyed, and other forms of difference that may have had effects on daily life, such as religion or language, were not considered. Nevertheless, the process of census making precisely implied the transformation of the complex social realities of the individuals into standardized and uniformly comparable units. The process of serialization required this: “The real achievement of the census operation reached far above the collection of population data: it serialized the social realities of the citizens in a uniform way. Every single citizen could be described individually by the same criteria, once the census was completed.”¹⁴

If we focus only on the racial/ethnic/national differences as they evolved over time (as synthesized in table 1), we see how serialization leveled the population to properties that were considered more relevant for administration and erased other forms of difference that were considered more salient by pre-republican society: by the mid-19th century, nationality became the sole marker that the census registered.

10 *Repertorio Chileno. Año de 1835* (1835) 171 ff.

11 *Censo Jeneral de la República de Chile* (1866).

12 *Quinto Censo Jeneral de la Población de Chile* (1876).

13 *Sesto Censo Jeneral de la Población de Chile* (1889).

14 GÖDERLE (2016) 80.

Racial/Ethnic/National categories:

1778	1784	1812	1813	1835	1865	1875	1885
White	Spaniards	Spaniards	American Spaniards	None	Nationality	Nationality	Nationality
Indios	Indios	Indios	European Spaniards				
Mestizos		Mestizos	Asian, Canarian, African Spaniards				
Blacks		Mulattos	Foreign Europeans				
		Blacks	Indios				
			Mestizos				
			Mulattos				
			Blacks				

The table is particularly illustrative of how differences were both constructed and concealed in the process of counting. The item on nationality was quite evidently intended to supersede other kinds of ethnic or racial adscription. The distinction of 1813, for example, between different categories of Spaniards is, however, particularly interesting in that it shows that categories of difference also contain differences within themselves. The category 'Indios', which is a constant in our samples from 1778 until 1813, is also a case in which difference could be found within difference. Do they belong to the *Picunche*, the *Huilliche*, the *Pehuenche*, or the *Puelche*? Are they *Wenteche*, *Nagche*, or *Lafkenche*? Are they perhaps Christian or non-Christian? – and do these further distinctions matter at all?

These observations are simply made to suggest that categories of difference cannot avoid, at the same time, concealing differences, and, in my view, this means that the (legal) historian cannot simply name what has been made invisible without going down a rabbit hole of further distinctions. This does not mean that the counterfactual critique of existing or past law is not valuable; it is necessary. However, this manner of proceeding has to rely on informed knowledge about the differences that are actually being produced by law. The first step is thus methodological, and it is asking: what differences are produced through the constitution? The following section

addresses this issue by looking at the Chilean regulations and constitutions that were enacted between 1810 and 1980.

3 Constructing and concealing difference in Chilean constitutional history

Like other Latin-American states, Chile has had several constitutional documents throughout its history. Four provisional regulations and one provisional constitution characterized the independence era, between 1810 and 1818, while four constitutions were enacted during the period of republican consolidation in the decade between 1822 and 1833. From 1833 until the present, Chile has only had two constitutional documents: one from 1925, when Arturo Alessandri successfully derogated the 1833 Constitution to strengthen the powers of the presidency; and that of 1980 enacted during the dictatorship of Augusto Pinochet. This latter constitution is still in force, though subject to several reforms since 1989, the reforms of 2005 being arguably the most important.

This section does not seek to provide a comprehensive review of Chilean constitutional history. Instead, I focus on four ways in which Chilean constitutions have created difference either through distinctions it produced or by omission. These are only intended to serve as examples of the manner in which constitutions, despite the semantics of equality, have constructed different forms of difference. The following sections thus deal with the treatment of corporate and individual representation, of nationality and citizenship, and of religious diversity to illustrate how the constitution produces and reproduces forms of societal difference through its text, and the implicit assumptions that surround it. The final section, by looking at the problems of economic inequalities, gender and sexual diversity, and the status of indigenous peoples, addresses how the abstract principle of legal equality conceals and reinforces the implicit assumptions and societal prejudices on which constitutional texts are based.

3.1 Corporate and individual representation, 1810–1833

During the process of independence from Spain (1810–1818), several self-appointed bodies, the *juntas*, drafted provisional regulations. The first of these texts was the *Reglamento Provisional de la Junta Gubernativa del Reino* from 1810, followed by the *Reglamento para el arreglo de la Autoridad Ejecutiva Provisoria de Chile* from 1811.¹⁵ These first two regulations were not properly constitutions and were intended to regulate the government of the Kingdom of Chile during the French occupation of Spain. The regulation of 1812 began to lay the groundwork for the independence of Chile from Spain by removing recognition of Spanish sovereignty in favor of “the People of Chile”.¹⁶ It declared, in its second article that “[t]he People shall make its constitution through their representatives” and declared in article 5 that “[n]o decree, provision or order emanating from authority or court outside of the Chilean territory shall have any effect”.¹⁷ The regulation of 1814 created the role of the Supreme Director, which concentrated the power of the executive in one person.¹⁸ This constitutional period of the Independence concluded in 1818 with the enactment of a *Provisional Constitution for the State of Chile*.¹⁹ In the period of republican consolidation, the constitutional drafts shifted the sovereignty from the people to the nation. The constitutions of 1822, 1823, and 1828 began with defining ‘The Chilean Nation and Chileans’ and declared that the Nation was the ultimate source of sovereignty. While the 1833 constitution also declared the Nation as the source of sovereignty, its structure was different, beginning with the territory and including the definition of the Nation within the section on the form of government.

José María Portillo, through his analysis of the Hispanic-American constitutional process, has argued that “reducing the diversification of the constituent power and ‘nationalizing’ it, in the sense of making it function only within the spaces that are defined as nations, was therefore the first visible characteristic of the constitutionalism immediately following the independence.”²⁰ At the heart of this push towards ‘nationalization’ was the question

15 *Reglamento para el arreglo de la autoridad ejecutiva provisoria de Chile*.

16 *Reglamento constitucional provisorio del Pueblo de Chile* (1812).

17 *Reglamento constitucional provisorio del Pueblo de Chile* (1812).

18 *El reglamento para el gobierno provisorio*.

19 *Proyecto de Constitución Provisoria para el Estado de Chile* (1818).

20 PORTILLO (2016) 70.

of sovereignty and representation. With the crisis of the Spanish monarchy and its repercussions among the American kingdoms, sovereignty was understood to have reverted to the ‘pueblos’ as the basic corporate units of representation. The formation of *juntas* in different territories of the Americas and their transition to forming congresses responded to the idea of reconstructing the legitimacy of the larger political units that had collapsed after the Napoleonic invasion. The first Chilean juntas therefore sought to recreate the kingdom as the general political body of the *pueblos* and provinces of Chile. The whole process of independence was, however, riddled with conflict over where to place the ultimate source of sovereignty: in the local republics constituted by *pueblos* and provinces, or in the larger political body identified with the nation or the people. As Portillo notes, the nation was not a predetermined outcome of this constituent process because, as happened to be the case in many places, the constituent power manifested itself in provinces and towns, leading potentially to the appearance of countless sovereign and self-constituted republics.²¹

This tension was already evident in the formation of the First Congress of Chile. After its dissolution by the Spanish regiment in 1811, José Miguel Carrera wrote that the Congress had been “null since its inception [...]”.

“The *pueblos* elected their representatives before their number of inhabitants had been counted and before knowing how many [representatives] they were entitled to. Thus, a field with four huts had as much representation as the most populous neighborhood [...]. Chile has committed the same errors of the Spanish courts, which it is repeating.”²²

Carrera’s comments signaled the tensions between individual and corporate representation that was at the heart of the early constitutional process. These tensions began to be addressed during the period of republican consolidation when the nation was placed as the source of all sovereignty. The 1822 Constitution stated in “Art. 1. The Chilean Nation is the union of all Chileans: in it essentially resides the Sovereignty, the exercise of which it delegates according to this Constitution”;²³ the 1823 Constitution says: “Art. 1. The State of Chile is one and indivisible: National Representation is distributed across the Republic”;²⁴ and the 1828 Constitution declared in “Art. 1.

21 PORTILLO (2016) 41.

22 Quoted by SILVA CASTRO (1953) X.

23 *Constitución política del Estado de Chile* (1822).

24 *Constitución política del Estado de Chile* (1823).

The Chilean Nation is the political union of all Chileans, natural and legal.”²⁵ Finally, the 1833 Constitution declared in Art. 3 that “[t]he Republic of Chile is one and indivisible” and in Art. 4 stated that “[t]he sovereignty resided essentially in the Nation which delegates its exercise to the authorities established in this Constitution.”²⁶ The first and foremost interest of the constitutions that were enacted during the early republican period was thus to dissolve the representative power of the provinces and the *pueblos*, and create new forms of general representation. The local diversity of political power was therefore the first victim of the leveling effect of the constitution and its creation of the Chilean nation.²⁷

3.2 Nationality and citizenship, 1810–1980

The second way differences were reconstructed was through the creation of ‘Chileans’, the category that grouped the individual members of the nation. In the Constitution of 1822, Chileans were defined as those “born in the territory of Chile”; “the children of Chilean father and mother, even if born outside the country”; “foreigners [men] married to Chilean [woman], after three years of residence”; and “foreign men married to foreign woman, after five years of residence” having a certain income and property.²⁸ The 1823 Constitution with certain variations adopted these definitions and included those individuals given the nationality through grace by the legislative branch.²⁹ The 1828 Constitution distinguished between natural and legalized Chileans, and the 1833 Constitution simplified the distinctions to birth-place, blood, and naturalization by residence or grace.³⁰ The operative cat-

25 *Constitución política de la República de Chile* [1828].

26 *Constitución de la República de Chile* (1833).

27 The *Federal Laws* of 1826 took the older principle and established in article 1 that “[t]he Republic is divided into provinces, municipalities, and parishes”; article 5 established that each province would have an assembly, and following articles granted the assemblies great powers in administration, taxation, and appointment of judges, among others. These laws prompted a protracted civil war that ended in 1832 and led to the enactment of the 1833 Constitution, which definitively eliminated the representation of the provinces. See *Proyecto de un reglamento provisorio para la administración de las provincias, presentado al Consejo Directorial por el Ministro del Interior, en 30 de Noviembre de 1825*.

28 *Constitución política del Estado de Chile* (1822).

29 *Constitución política del Estado de Chile* (1823).

30 *Constitución política de la República de Chile* (1833).

egories that had been functional in the previous period – Spaniards, Indios, mestizos, mulattos, blacks – were thus rendered irrelevant as primary identity markers for the constitutional order.

Though found in the same section of the 1833 constitution, nationality was understood throughout the 19th century as a category that was distinct from citizenship. The 1822 Constitution indicated in Art. 14: “Citizens are all those who have the qualities contained in Art. 4 [of Chileans] as long as they are over twenty-five years of age, or married, and can read and write.”³¹ The 1823 Constitution placed higher requirements on citizenship. Art. 11 indicated that the active citizen had to be of twenty-one years of age or married, Catholic, be able to read and write (in 1840) and fulfill certain formal requirements. Citizens also had to have at least one of the following: real estate of at least 200 pesos; commercial activity of at least 500 pesos; an industrial profession; to have taught or brought invention or industry to the country; to have fulfilled their civic merit.³² The 1828 Constitution defined active citizens as Chileans who had achieved twenty-one years of age, or earlier if they were married or served in a militia; and practiced a science, art or industry, or held employment, or had capital, or had landed property off which to live.³³ Finally, the 1833 Constitution defined citizens in Art. 8 as Chileans of twenty-five years of age, if single, and twenty-one, if married, and able to read or write. It also required one of the following: 1) property or capital invested in an industry; 2) the practice of an art or employment or being in receipt of rent or income.³⁴

Citizenship could also be lost or suspended for different reasons. According to the 1822 Constitution, citizenship could be suspended as a result of “legal incompetence owing to moral or physical incapacity”; because of debt; for those in the station of “salaried domestic servant”; in cases of “unknown mode of living”; or if the individual was going through criminal proceedings.³⁵ In the 1823 Constitution, citizenship was lost, among others, in cases of “fraudulent bankruptcy”. Citizenship was suspended in cases of judicial conviction; owing to “physical or moral ineptitude that allows free and reasoned action”; because of debt; on account of a lack of employment

31 *Constitución política del Estado de Chile* (1822).

32 *Constitución política del Estado de Chile* (1823).

33 *Constitución política de la República de Chile* [1828].

34 *Constitución de la República de Chile* (1833).

35 *Constitución política del Estado de Chile* (1822).

or “known way of life”; if one was a domestic servant; as a result of criminal conviction; or because of “habitual inebriation or gambling”.³⁶ The 1828 Constitution suspended citizenship because of “physical and moral ineptitude, for those in the station of domestic servant, or for being in arrears with taxes. Citizenship was lost, among other things, owing to conviction for notorious criminal activity, and fraudulent bankruptcy.”³⁷ The 1833 Constitution followed the same articulation.³⁸ Since many articles of the constitution protected or granted certain faculties to citizens, and not to nationals, the manner in which citizenship was defined had consequences not only for representation, but also for constitutional guarantees more generally.

The distinction between nationality and citizenship is illustrative of how the constitution contained and sought to reconcile the tensions between equality and difference. As seen in the previous section, one way in which nationality acted for equalization was by detaching representation from the corporate bodies and tying individual representation to the nation-state. In the early constitutional documents, having Chilean nationality guaranteed equal treatment under the law, allowed the occupation of public office, and was tied to the obligation to help shoulder the ‘burden of the State’.³⁹ The 1828 Constitution tied the constitutional guarantees less to nationality and rather bound them to the idea of ‘men’. In Art. 10, it stated that the “nation guarantees every man, as unalienable and imprescriptible rights, *liberty, security, property, the right to petition, and the faculty to publish opinions*”.⁴⁰ In Art. 125, it went on to declare “[a]ll men equal before the law”. The form of the 1828 Constitution pertaining to the guarantee of the rights of *man* presumably shows, as Bartolomé Clavero has argued, that what was understood here was effectively the individual male who enjoyed “both freedom in the public domain and power in the private sphere”.⁴¹ This, of course, did not include women or those considered dependents, such as workers or servants. Equality before the law was, until 1828, thus understood in a rather restrictive manner.

36 *Constitución política del Estado de Chile* (1823).

37 *Constitución política de la República de Chile* [1828].

38 *Constitución de la República de Chile* (1833).

39 *Constitución política del Estado de Chile* (1822); *Constitución política del Estado de Chile* (1823).

40 *Constitución política de la República de Chile* [1828].

41 CLAVERO (2005) 21.

This was changed in the 1833 Constitution, which declared in Art. 12 that “every inhabitant of the Republic” is guaranteed “equality before the law” alongside other rights listed in the article.⁴² The 1925 Constitution sustained this formulation by guaranteeing equality before the law to “every inhabitant of the Republic.”⁴³ The 1980 Constitution provided guarantees of “equal protection before the law and exercise of rights” to “every person.”⁴⁴ Chilean legal scholars understood this function of nationality after 1833 as establishing for ‘all inhabitants’ the bond between individual and State.⁴⁵ Equal rights and obligations derived from this bond were understood to be guaranteed by the political constitution irrespective of class, race, and gender.

While nationality undergirded the principle of equality before the law, the idea of citizenship was of a different nature altogether. The implicit expectation of citizenship, as granting political rights, was that it could only be exercised by restricted segments of the population. This was elaborated upon in Chilean constitutional scholarship by Jorge Huneeus, who, in his 1888 analysis of the Constitution of 1833, in force at the time, argued that citizenship should not be regarded as a right but as the exercise of a public office. With this in mind, restrictions on the exercise of suffrage rights, as for any public office, had to be based on the “*capacity, intelligence and independence* of voters.”⁴⁶ Suffrage rights were thus “restricted and entrusted only to the persons who satisfy the mentioned conditions,”⁴⁷ which, as we have seen, ranged from literacy to having property or a profession. The issue of women’s suffrage was also a question on which the constitution was silent. Huneeus addressed this issue in the same study, arguing that, though not “literally and categorically excluded from suffrage” in the constitutional text, women would not be qualified to suffrage rights since they were also usually excluded from holding public office.⁴⁸

The 1925 Constitution sustained these differences between nationality and citizenship. Citizenship was granted to “Chileans who have reached twenty-one years of age, can read and write, and are enrolled in the elec-

42 *Constitución de la República de Chile* (1833).

43 *Constitución Política de la República de Chile* (1925), Art. 10.1.

44 *Constitución Política de la República de Chile* (1981), Art. 19.

45 MATTIA VIAL (1922) 249.

46 HUNEEUS (1890) 87. Italics in the original.

47 HUNEEUS (1890) 67.

48 HUNEEUS (1890) 89.

toral registers.”⁴⁹ The suspension of citizenship was reduced to two conditions: “1. Physical or mental ineptitude that impedes free and reflexive reasoning; and 2. The citizen being prosecuted for a felony that carries a grievous sentence”. Citizenship could be deemed forfeit through the loss of Chilean nationality and “For conviction of a grievous sentence.”⁵⁰ Again, though the Constitution did not explicitly exclude women from suffrage, they did not gain the right to vote in local elections until 1935 and had to wait until 1952 to vote in presidential elections. The 1980 Constitution only restricted citizenship to Chilean nationals over the age of eighteen, thus reflecting the overall trend toward universal suffrage that played out throughout the 20th century.⁵¹

Thus, until the around the 1960s, citizenship was qualitatively different from nationality insofar as it was considered to encompass only a very narrow segment of the total population. José María Portillo has noted that the constitutional construction of nationality and citizenship implied a “double process of re-personalization”.⁵² On the one hand, the process of republican constitutionalism created a general process of inclusion through nationality. On the other hand, indigenous peoples, women, and other subaltern groups were often deprived of citizenship through its requisites, the conditions for suspension, and by underlying assumptions about requirements of individual quality and worth. The overall process can be described as one of general inclusion, through the act of leveling out differences on the marker of nationality, and one of selective disenfranchisement through the reintroduction of economic, social, ethnic / racial, and gendered differences through the system of citizenship. The moment of equalization and the moment of differentiation of the constitution cannot be separated from one another.

3.3 Religious unity or diversity, 1810–1980

Chilean constitutional history has also managed the issues of religious diversity and freedom of religion in different ways. While ready to break politically from the Spanish crown, early constitutional texts were more ambivalent about breaking with the prominent role of the Catholic faith in public

49 *Constitución Política de la República de Chile* (1925), Art. 5.

50 *Constitución Política de la República de Chile* (1925), Arts. 8 and 9.

51 *Constitución Política de la República de Chile* (1981), Art. 13.

52 PORTILLO (2016) 70.

life. The constitutional debate throughout the 19th century would focus more on the question of religious tolerance rather than on questions of the separation of Church and state or freedom of religion. Different constitutional texts followed different political projects, and the wording of the relationship between state, nation, and the Church varied accordingly.

The *Reglamento Constitucional Provisorio* of 1812 was an example of ambiguity that drew condemnation from sectors aligned with the Church despite the prominent place the Catholic faith was granted in the text. In Art. 1, it declared: “the Catholic Apostolic faith is and always will be that of Chile.”⁵³ Since it had failed to refer explicitly to the Roman Catholic Church and exclude the practice of other religions, this constitution was seen as providing cover for the practice of dissenting faiths.⁵⁴ The 1818 Constitution addressed these issues in Title II “Of the Religion of State”, declaring in one sole article:

“The Roman Catholic and Apostolic Religion is the only and exclusive religion of the State of Chile. Its protection, conservation, purity, and inviolability will be one of the primary duties of the leaders of society, who shall not ever allow other public worship or doctrine contrary to that of Jesus Christ.”⁵⁵

The distinction between public and private worship introduced by the 1818 Constitution provided the model followed by most 19th-century constitutions for reconciling the primacy of the Catholic faith with the embrace of religious tolerance. The Constitution of 1822 explicitly called attention to the distinction between public acts and private opinions in Art. 10:

“The Religion of the State is the Roman Catholic and Apostolic with exclusion of any other. Its protection, conservation, purity, and inviolability are one of the primary duties of the Heads of State, as well as the utmost respect and veneration of the inhabitants of its territory, *regardless of their private opinions*.”

Additionally, the constitution declared in Art. 11 that “[a]ny violation of the previous article is a crime against the fundamental laws of the country”.⁵⁶ This constitution was exceptional in that it anchored its views on religious tolerance on the freedom of opinion. Subsequent constitutions focused instead on the prohibition of *public* worship, which, we shall see, had doc-

53 *Reglamento constitucional provisorio del Pueblo de Chile* (1812).

54 QUIROZ GONZÁLEZ (2020) 2.

55 *Proyecto de Constitución Provisoria para el Estado de Chile* (1818).

56 *Constitución política del Estado de Chile* (1822). Italics are mine.

trinal consequences towards the late 19th century. The 1828 Constitution thus declared in Art. 3 that the religion of the Chilean nation “is the Roman Catholic and Apostolic with exclusion of the public practice of any other”.⁵⁷ Art. 5 of the 1833 Constitution, finally, declared the Catholic faith the religion of the Republic of Chile, “excluding the public exercise of any other”.⁵⁸

Within the spectrum of early constitutional texts, the 1823 Constitution was an outlier, not only for suppressing the possibility of religious tolerance, either through freedom of opinion or through private worship, but also for making the profession of the Catholic faith an explicit requirement for citizenship. Art. 10 of the 1823 Constitution thus stated: “The Religion of the State is the Roman Catholic and Apostolic: excluding the cult and practice of any other.”⁵⁹ Given the fact that the nascent Chilean state wished to benefit from closer economic ties to Britain and the United States and attract foreign migration, other constitutional texts had taken a pragmatic view toward religious tolerance. The framer of the 1823 Constitution, Juan Egaña, had argued against these pragmatic views in his *Examen instructivo sobre la Constitución Política de Chile, promulgada en 1823*, by pointing out that “without a uniform religion you can build a nation of merchants, but not one of citizens”. He expanded on these views some years later in his *Memoria política sobre si conviene a Chile la libertad de cultos*,⁶⁰ in which he more emphatically defended the view that any concessions on religious tolerance would lead to a state of faithlessness and hence to unrest and to the potential destruction of the state. “To avoid these evils – he argued – the best remedy that politics has found has been to have a uniform religion and with this empire have found a long and solid consistency.”⁶¹

These views on how to deal with religious diversity in the early republican order, however, did not become dominant in the 19th century. Instead, the issue of religious tolerance seems to have been settled by relying on the distinction between public and private worship. This distinction made it possible to sustain the official and public primacy of the Catholic faith while allowing the private practice of other religions. This was the solution pro-

57 *Constitución política de la República de Chile* [1828].

58 *Constitución de la República de Chile* (1833).

59 *Constitución política del Estado de Chile* (1823).

60 For a review of the context of this text, see STUVEN (2016).

61 EGAÑA (1825) 26.

vided by the 1833 Constitution, which, through laws and refining the constitutional interpretation of Art. 5, eventually allowed a constitutional recognition of religious tolerance that did not go so far as to guarantee freedom of religion. An 1844 law, for example, allowed the marriage of non-Catholics without requiring them to appear before a Catholic priest, while, in 1852, the president allowed the construction of a Protestant church.⁶² The enactment of the Interpretative Law of July 27, 1865, however, gave freedom of worship constitutional status just as increased migration from Northern Europe began to reshape the religious makeup of the country and as lawmakers increasingly took on more liberal and positivist positions.⁶³ This law made clear that Art. 5 of the Constitution allowed religious practice in privately owned spaces and allowed religious education in privately administered schools. Jorge Huneeus argued that this interpretative law, alongside the broadened freedom of press and gathering, meant that Chile enjoyed freedom of religion *in fact* even if it was not constitutionally enshrined among the guarantees.⁶⁴ The interpretative laws were complemented by a series of reforms in the 1880s that removed many public functions from the Church: the law of non-denominational cemeteries; the law of civil marriage; and the creation of the civil registry office, which took birth, death, and marriage certificates away from the Catholic Church. These steps toward freedom of religion were eventually enshrined in the 1925 Constitution, which guaranteed the “profession of all faiths, freedom of conscience and the free exercise of all cults that are not opposed to moral, good customs and public order [...]”.⁶⁵

The Constitution of 1980 presented a different way of structuring the problem of religious diversity, freedom of conscience, and secular public policy. While point number 6 of Art. 19 on “Constitutional Rights and Obligations” guarantees the “freedom of conscience, the profession of all faiths and the free exercise of all cults that are not opposed to moral, good customs and public order”,⁶⁶ the constitution is founded on and prescribes many elements of a doctrinal Catholic worldview. These clauses are found

62 QUIROZ GONZÁLEZ (2020) 6.

63 On the latter, see BASTIAS SAAVEDRA (2015b).

64 HUNEEUS (1890) 72.

65 *Constitución Política de la República de Chile* (1925), Art. 10,2.

66 *Constitución Política de la República de Chile* (1981), Art. 19,6.

mainly in Arts. 1 and 19 of the constitution. While previous constitutions had dedicated Art. 1 to the forms of government and the territory, the 1980 Constitution uses this article to provide the doctrinal framework of the entire constitutional text by placing individuals and the family at its core and giving the state a subsidiary role in the structure of society.⁶⁷ Art. 19, which lists the constitutional guarantees, declares in its first clause that the Constitution protects “The right to life and the physical and psychological integrity of the person”, and subsequently declares that “[t]he law protects the life of the unborn”,⁶⁸ thus giving the prohibition of abortion constitutional status. These ideas were explicitly taken from Catholic doctrine and philosophy and were criticized within the constituent commission as imbuing the constitutional text with “religious doctrine”.⁶⁹

Other issues on religious diversity were also noted within the constituent commission, particularly the fact that the Catholic Church enjoyed legal personality under public law, while other religions were considered legal persons under private law. This distinction had major consequences during the dictatorship, since the Catholic Church had enjoyed more robust protections against the authoritarian state than churches of other denominations. Decree laws put into force throughout the 1970s had given the military regime faculties to impede internal elections, supervise board meetings, install boards of directors, and supervise the funding of private corporate entities.⁷⁰ These differences among the legal status of Churches was eventually addressed by Law 19.638 of 1999, which provided a legal, though not constitutional solution, to this issue.⁷¹

3.4 Silences and blind spots in (Chilean) constitutional law

While issues of corporate or individual representation, nationality and citizenship, and religious diversity have been part of Chilean constitutional doctrine for almost two centuries, other differences have received less attention. In the remainder of this section, I should like to address briefly the

67 CRISTI (2014) 29.

68 *Constitución Política de la República de Chile* (1981), Art. 19,1.

69 CRISTI (2014) 35.

70 QUIROZ GONZÁLEZ (2020) 14.

71 QUIROZ GONZÁLEZ (2020) 16–17.

questions of economic differences, gender and sexual diversity and, perhaps the greatest silence of Chilean constitutional law, the status of indigenous peoples.

As we have seen from the discussions on the question of citizenship, economic differences had acquired constitutional status, by granting owners and holders of certain professions privileged access to suffrage rights. The constitutional texts operated in a way by generating constitutional (legal) differences by relying on preexisting economic conditions. The 1925 Constitution dealt differently with economic differences by giving the state certain constitutional powers vis-à-vis private actors.⁷² Property rights, for example, were guaranteed but their exercise was “subject to limitations or rules required for the maintenance and progress of the social order”.⁷³ The Constitution also protected work, industry, and social provision “as long as they refer to sanitary housing and the economic conditions of life, so as to secure a minimum of welfare to each inhabitant, according to the satisfaction of his personal needs and those of his family”.⁷⁴ The social foundations of the 1925 Constitution were undone by the neoliberal infused text of the 1980 Constitution, which sought to “consolidate an economic structure based on economic freedom, non-discrimination, property rights, and an alleged technocratic neutrality of the state organs with competence in economic matters”.⁷⁵

Gender and sexual diversity were not considered in the different constitutions, though the justification for these omissions varied. The constitutions of the 19th century did not make explicit reference to the exclusion of women from holding public office or suffrage rights because it was presumed that a higher and natural order had given women a different role in society. This was addressed by Jorge Huneeus in 1888, as women began to demand access to voting rights:

“This exclusion [of women from suffrage rights], even though not explicitly stated in the Fundamental Laws, has reasons of a higher order: that established by God and Nature by giving women in Society, and above all, in the family, a number of

72 BASTIAS SAAVEDRA (2015a).

73 *Constitución Política de la República de Chile* (1925), Art. 10,10.

74 *Constitución Política de la República de Chile* (1925), Art. 10,14.

75 FERRADA (2000) 50. On the economic use of the concept of non-discrimination in constitutional law after 1970 see the article by Fernando Muñoz in this volume.

obligations that are truly incompatible with the active exercise of Citizenship to its fullest extent.”⁷⁶

This passage reveals quite clearly how constitutional interpretations rested on social convention. The constitutional text never explicitly granted rights to women to hold public office and exercise suffrage rights, but the interpretation shifted throughout the 20th century. The 1980 Constitution operates on the assumption that both men and women enjoy all the rights of citizenship.

Sexual diversity has also only become an issue of constitutional discussion especially since the early 2000s through jurisprudence. The decriminalization of same-sex relations in 1999, a statute against sexual discrimination in 2012, the creation of a civil union pact for same-sex couples in 2015, and the enactment of a gender identity statute in 2018 have led to an emerging “sexual diversity citizenship” in Chile.⁷⁷ At the level of constitutional interpretation, however, the Chilean Supreme Court and the Constitutional Tribunal have assumed a deferential attitude toward societal prejudices. In a 2004 case, the Supreme Court denied a mother guardianship of her daughters because of her sexual orientation, arguing that a “same-sex couple could never provide a proper setting for raising Children.”⁷⁸ In 2012, the Inter-American Court of Human Rights reversed the decision in a landmark ruling on sexual diversity. In 2011, the Constitutional Tribunal declared that the definition of marriage as the union between a man and a woman found in Art. 102 of the Civil Code was not unconstitutional, and ruled that the constitution did not guarantee a right to marriage to same-sex couples.

Finally, indigenous peoples have not been part of Chilean constitutional doctrine, nor have they been part of constitutional debate as has been the case since the 1980s in other Latin-American countries. Only the 1822 Constitution mentions indigenous peoples, charging Congress in Art. 47, n. 6 with “[p]roviding the civilization of the Indians in the territory.”⁷⁹ An edict signed in 1819 had taken an enlightened view by declaring that indigenous peoples, as Chileans, enjoyed the same protections and rights as any inhabitant of the territory:

“The Indians who lived [under Spanish rule] without enjoying the benefits of society and died in infamy and misery, forthwith shall be called Chilean citizens

76 HUNEEUS (1890) 89.

77 For a more detailed analysis, see the article by Fernando Muñoz in this volume.

78 Quoted by Fernando Muñoz in this volume.

79 *Constitución política del Estado de Chile* (1822).

and will be free, as other inhabitants of the State, with which they will have equal voice and representation, entering for themselves into any kinds of contracts, in the defense of their causes, in contracting marriage, commerce, and choosing the arts to which they are inclined, and have a profession in letters or arms, to obtain political and military employment according to their health.”⁸⁰

It is difficult to determine whether this was the view taken by constitutional doctrine. In any case, as we have seen, indigenous peoples would have rarely fulfilled the constitutional requirements of literacy or income for enjoying full citizenship rights. Additionally, it must be taken into consideration that an important number of the indigenous peoples of Chile lived beyond the reach of the Chilean State in territories that remained autonomous until the late-1880s. The gradual incorporation of these territories since the 1850s meant that indigenous populations were not governed by constitutional law, but rather through special laws for the territories in what amounted to living in a state of martial law. Even in the last decades of the 20th century, when nations such as Ecuador and Bolivia were moving toward defining themselves as plurinational states, Chile did not consider these issues seriously in constitutional debate.⁸¹ Only in 2017 was there a consultation directed to indigenous communities as inputs for the framing of a new constitution.

4 Conclusions

This brief overview of the differences generated through the various Chilean constitutions between 1810 and 1980 illustrates that the constitution did not act as a *par tout* instrument of equalization. In the construction of its categories, it leveled the population and reintroduced new differences. Social differences, however, were not made invisible: they were there, evident if one followed the biases and assumptions of the time. The early constitutional projects were equalizing in some aspects, for example, against the division of the nation into autonomous local republics. To avoid this, the constitution created the nation and Chileans as its members, as the ultimate sources of political sovereignty. In other aspects, the constitution sustained the differ-

80 O'HIGGINS (1819).

81 During the discussion of Law n. 19,253 on indigenous peoples, congressional representative Mario Palestro tried to include the expression “pluri-ethnic State” in the bill during the session of January 21, 1993. This indication was voted down in the special commission. See NÚÑEZ POBLETE (2010) 55.

ences that were evident to the societies of the 19th century. Women were not of the same quality as men; single men were not of the same quality as married men; domestic servants could not be included in the polity; individuals of low moral character could not be considered citizens; Catholics had access to guarantees that were not granted to non-Catholics; and sources of income and overall economic status provided some with protections that were not afforded to others. These were only some forms of difference that the constitution, explicitly or implicitly, constructed or sustained.

Focusing on the differences constructed through Chilean constitutional history, one can rethink the transition from the *ancien régime* to modern constitutionalism not as a process oriented toward or by equality, but rather as the construction and unfolding of new differences. Early modern juridical culture was founded on the assumption that natural social differences had to find a correlate in law. Accordingly, all kinds of differences were marked through the *iura singularia* or *privilegia*, through which different groups of persons or social circumstances found a correlate in the juridical sphere: nobles, poor and miserable persons, older people, the sick, merchants, and so on. Indigenous inhabitants of the Americas were included in the category of *personae miserabiles*. These differences were sustained in a different kind of constitutional order, one in which the unity of the natural and divine order presupposed the existence of different corporate bodies. The early constitutions of Chile show that this logic was no longer sustainable precisely because the creation of nation-states required the dissolution of local political representation. To achieve this, the creation of the nation and Chileans was a fundamental act of territorial equalization which however allowed the reintroduction of different forms of difference. If the colonial period had sustained differences between Spaniards, *Indios*, and foreigners, the constitutional process constructed new differences between Chileans, citizens, and foreigners. In this process, some forms of differences that had been prevalent during the colonial period, such as being Catholic, were explicitly sustained, while other forms of difference were implicitly reintroduced through the various requirements for citizenship. In all, the constitutional process shows that legal formulae did not produce a par tout equalization of the population; instead, equality and difference were reconstructed and adapted to the societies that emerged from the dissolution of the order of the *ancien régime*.

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The Constitutional Embedding of Differences, 1921–1997: The Polish Example

1 Introduction

Investigating the embedding of differences in Polish constitutional history requires a cross-referencing approach, which is, however, basically limited to the 20th century. In the 19th century, the residents of the Polish territories under Prussian, Austrian and Russian rule were merely bystanders, not subjects and co-creators of the modern constitution-making process. Therefore, the discussion can only be based on the constitutions of 1921,¹ 1935,² 1952³ (the 1952 case is not the result of an effort of the Polish sovereign body – the Nation – as the text was adopted in close agreement with the Soviet authorities by a parliament fully dependent on, and operated by, the Communist Party, PZPR),⁴ and, finally, the so-called Constitution of the Third Republic of 1997.⁵ The way in which the lawmaker approaches the question of the Nation as well as the social and economic issues in these constitutions seems to be sinusoidal, which also reflects the embedding of diversity in different ways. At the same time, it is worth noting that the Polish interwar constitutions were created in completely different factual circumstances from the post-war ones. The constitutions of 1921 and 1935 were established for a multi-ethnic,⁶ multilingual, multidenominational and multicultural state,

- 1 Constitution of the Republic of Poland of 17th March 1921 (Journal of Laws No. 44, item 267) with key amendment of 1926 – Act Amending the Constitution of the Republic of Poland of 17th March 1921 of 2nd August 1926 (Journal of Laws No. 78, item 488).
- 2 Constitutional Law of 23rd April 1935 (Journal of Laws No. 30, item 227).
- 3 Constitution of the Polish People's Republic of 22nd July 1952 (Journal of Laws No. 33, item 232) and its fundamental amendment – the act on amending the Constitution of the Polish People's Republic of 29th December 1989 (Journal of Laws No. 75, item 444).
- 4 Polska Zjednoczona Partia Robotnicza (Polish United Workers' Union; created 1948 and dissolved 1990).
- 5 Constitution of the Republic of Poland of 2nd April 1997 (Journal of Laws No. 78, item 483).
- 6 Carrying out the census in those times did not raise such controversy as, for example, under Prussian rule [BELZYŃ (2013) and its polemics], although, of course, the process was

which inherited three key legal orders after the partition and did not fully unify them until the outbreak of the Second World War. The Constitutions of 1952 and 1997 were created in different conditions: as the state shifted geographically (in 1945), the result was the creation of a homogenous state in many respects. Paradoxically, Polish constitutions – with the attitude of their makers towards how to construct and to emphasize diversity, or how to leave some issues unsaid – are arranged into a specific sine wave. The Constitutions of 1921 and 1997 have much in common. They are post-regime, post-transformation acts (after regaining independence in 1918 and sovereignty, and after the fall of Soviet influence in Poland, in 1989), which grant the role of the sovereign body to the Nation, understood as a heterogeneous whole, recognising the message of historical experience, but constructing a democratic-liberal system for the future.⁷ Both constitutions contain the key principles of modern constitutionalism (tripartite division of power, limited and responsible government, independence of the judiciary). They are based on the triad of democracy, the rule of law and individual freedom.

also burdened with some errors. The first census conducted in 1921 (with the exception of part of Upper Silesia and the region of Vilnius) was entrusted to individuals deemed competent and respected in their communities, acting as census takers. According to its results, 69 % of citizens identified as of Polish nationality, 15.17 % as 'Ruthenian' [Ukrainian and Rusyn], 7.97 % as Jewish, 4.03 % as Byelorussian, 2.99 % as German, and 0.09 % as Lithuanian. Cf. *Pierwszy Powszechny Spis Rzeczypospolitej Polskiej* [First Common Census of the Republic of Poland] z dnia 30 września 1921. *Mieszkania. Ludność. Stosunki zawodowe* [Habitation. Population. Professional Issues], Warszawa 1927, Tabl. XI: *Ludność według wyznania religijnego i narodowości* [Population according to denomination and nationality]. According to the Second Common Census of 1935, Polish was declared as their native/first language by 69 % of the then Polish citizens, Ukrainian by 10.1 %, 'Jewish' [Yiddish] by 7.8 %, Rusyn [Ruthene] by 3.82 %, Byelorussian by 3.1 %, German by 2.32 %, Hebrew by 0.76 %, Russian by 0.43 %, Lithuanian by 0.26 %, etc. (the second census did not include the question about nationality). Cf. *Drugi Powszechny Spis Ludności z dn. 9 XII 1931: Mieszkania i gospodarstwa domowe. Ludność*, Warszawa 1938, Tabl. X.

- 7 As expressed in the Preamble of the Constitution of 1997: "We, the Polish Nation – all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, Equal in rights and obligations towards the common good – Poland, Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values, Recalling the best traditions of the First and the Second Republic, Obligated to bequeath to future generations all that is valuable from our

In turn, the authoritarian Constitution of 1935 and the Communist one of 1952 both created undemocratic systems, also by distinguishing certain groups from others, building new political elites based on undemocratic criteria, and prioritizing certain legal institutions supporting the system. Their authors, who used the Constitution as a *programme*,⁸ merely applied various ideological principles to its framing.

In conclusion, these last 100 years of Polish history, as a laboratory of constitutionalism, clearly seem to offer an outstanding – but captious as well⁹ possibility to apply a comparative approach in research on diversity (e. g. democratic / undemocratic system cross-referenced with heterogeneity / homogeneity of ethnicity / dominant culture / religion). Despite similarities, the constitution-makers of each period adopted distinct attitudes to diversity and offered alternative blueprints on how to “manage the controversy”.¹⁰ Obviously, our reflection must be limited to the selected question and cannot aspire to be a comprehensive study. Issues selected for further consideration refer back to Manuel Bastias Saavedra’s essay.

2 Constitutions on the nation, nationality, and equal citizens

The term *Nation* is deeply rooted in Polish constitutionalism, insofar as the deputies of the Great Sejm (1788–1792) adopted the so-called 3rd May Constitution (formally entitled “Government Statute” to differentiate this Act from the ordinary legislative acts, simply called “constitutions”) in 1791

heritage of more than a thousand years, Bound in community with our compatriots dispersed throughout the world, Aware of the need for cooperation with all countries for the good of the Human Family, Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland, Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies, Recognizing our responsibility before God or our own consciences, Hereby establish this Constitution of the Republic of Poland as the basic law for the state based on respect for freedom and justice, cooperation between the public bodies, social dialogue as well as on the principle of subsidiarity in strengthening the powers of citizens and their communities. We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland.”

8 FRANKENBERG (2006) 453.

9 See FRANKENBERG (2006).

10 GEERTZ (1983) 184.

and applied this bold term to the constitutional text. It was intended to be a crucial step in Polish modernity and a kind of internal insurance policy against powerful neighbours interfering in Polish affairs for decades. The Constitution survived for only one year until it was repealed under the pressure of Russian troops, after the lost war of 1792. The Constitution, still preserving the social status quo of noblemen, townsmen and peasants with some political and economic concessions, reflected also some Enlightenment ideas in an exceptional melting-pot of the old and the new. So far, attempts to use the word 'Nation' had been blocked by the conservative members of the Great Sejm, but, in the "Government Statute", the term appeared, in a bold initiative. However, its precise meaning is still a question for debate: is it more than, merely, the political noblemen's Nation? If "all authority in human society takes its origin in the will of the people" (Article V), did the people still have to be represented exclusively by the noblemen sitting in the Great Sejm? Quite the reverse, commentators agreed that the notion of *Nation* used in Article XI referred to a more universal understanding of the term.¹¹

The Constitution of 1921 belongs to the family of similar fundamental acts created for the liberal, democratic, republican systems of those European countries new-born or reborn after the First World War. The reference point for the Polish Constitution was the French system of government of the Third Republic. 'The Nation' is a basic construct, repeated in the preamble ("We, the Polish Nation"), in the constitutional principles (as a declaration of sovereignty expressed by the universal formula: "the supreme power in the Republic of Poland belongs to the Nation"), and several other times: the public bodies are "bodies of the Nation" (Polish: "organy Narodu"), and parliamentarians are "representatives of the whole Nation". Even when "the Polish Nation" appears only in the preamble and in the text of the presidential oath, it raises the question of the inclusion mechanism: no other concrete nationalities appear.¹² The constitutional provisions concerning

11 Article 11: "The Nation bears a duty to its own defence from attack and for the safeguarding of its integrity. Therefore, all citizens are defenders of national integrity and liberties. [...]" Cf. TARNOWSKA (2016).

12 It happened only at the level of the ordinary legislation. It may be illustrated by the Law on the Principle of the Voivodeship Self-government of 1922 (Journal of Laws No. 90, item 829), which also referred to the national question in a very restrained way: in the south-eastern provinces, provincial Dietines divided in two *curias* were to be established,

ethnic groups refer to the “*national minorities*”, “equal life, freedom and property protection regardless of *origin, nationality, language*, race or religion” or “the right [of each citizen] to preserve their *nationality and to care for their language or national characteristics*” (Article 109).

The crucial constitutional category determining the legal status of the individuals is citizenship, understood universally as belonging to the state as a consequence of birthplace or secondary processes such as marriage or naturalization. A relatively broad catalogue of rights and freedoms was granted to “all citizens”. The Constitution of 1921 guaranteed their equality before the law, and public offices were to be equally accessible to all on terms and conditions prescribed by law. With the same constitutional provision, family and state privileges, coats of arms, and family and other titles were abolished, except for scientific, official and professional ones (Article 96). Article 110 refers exactly to the equal rights of “Polish citizens belonging to national, religious or linguistic minorities”. The full political and social participation of the individuals is constitutionally connected with citizenship, not nationality. The constitutional limitations of this participation are based on objective prerequisites: age and conviction for certain crimes, the latter resulting in a permanent or temporary deprivation of citizenship rights. This allows us to formulate the thesis that a ‘Polish Nation’ may already be understood in the March Constitution as it is in the current constitutional regulation (of 1997): as a political, non-ethnic category – as a community of equal citizens.¹³

The Constitution of 1935 dealt with the issue of the multinationalism of the state in a surprisingly simple way: it included not a single reference to ‘the Nation’ or ‘Polish Nation’. The Constitution created the fundamentals for an authoritarian (or ‘Bonapartist’) state, but unlike many other European constitutions of the 1930s, it did not formulate a nationalistic programme. As an opus originating in Marshall Piłsudski’s political camp, the constitution rather expressed the idea of cooperation of the nations within the framework of the Polish Republic (the ‘Jagiellonian concept’) and avoided

one of which should be a Ukrainian one (“kuria ruska”/“Ruthenian curia”). The provincial executive body was to consist of “two national sections”. Furthermore, a Ukrainian University was to be set up. The Law never came into force.

13 Cf. also the Rulings of the Constitutional Tribunal of 31 May 2004, K 15/04 and of 12 January 2005, K 24/04; SAFJAN/BOSEK (2016), commentary to Art. 4.

the category of 'Polish Nation', which could easily have been misused and narrowed down to a purely ethnic category by the right-wing parties, such as National Democracy, a key opponent of Piłsudski's political block. Therefore, the 1935 Constitution operated exclusively with references to the term 'citizens' (e. g., in the formula, "the state is a common good of all citizens"). It should be pointed out that this broad civic platform did not correlate with equally broad representation: as said already, the Constitution established an authoritarian system of government and did not involve all citizens in public life in equal manner, which will be analysed below.

The Constitution of 1952 also belongs to a specific constitutional wave – to the Eastern European and Central European fundamental acts imparted and accepted by the Soviet authorities, with the only formal approval of the existence of national constituent bodies. This Constitution is framed by the term 'Polish Nation' multiple times, combined with the concept of a 'people's state'. Surprisingly, in this Communist state – associated in principle with the concept of ideological and political internationality – everything could be 'national', from local councils appointed by the Communist Party to culture, as well as economic planning and the liberation struggle. The use of the very term 'Nation' is equally varied, with references to the "wealth of the Nation", the "respect for the Nation", the "sovereign rights of the Nation", the "service to the Nation", the "needs and aspiration of the Nation", alongside the "enemies of the Nation". Obviously, the legal language employed to construct this new monolithic identity became one of the most important tools to falsify reality. Nationality appeared in the context of "national belonging" which, equally to race, denomination, education, length of residence, social origin, occupation and financial status, is listed as a circumstance which cannot impact voting rights. 'Citizens' had equal rights regardless of their nationality, race and denomination. Moreover, violating this rule by privileging or limiting the citizens in their rights – due to a mentioned characteristic – was punished, as well as spreading hatred or humiliating a person based on those "differences" (Article 69). The category of "the citizen" also became a part of this huge deception: it was used multiple times in the constitutional text despite the ongoing process of objectification of these 'citizens' and their deprivation of rights. The irony of this situation may be emphasized by the fact that the term, "the citizen", was used on a large scale in everyday communication between the authorities and the inhabitants of the country, in official writings as well as, for instance, in police

warnings for a violation of the rules of the road. ‘Citizen’ was an object, not a subject of power, in the Communist state.

At the same time, this Communist Constitution was the first to introduce the term ‘women’ into the equality context, “in all spheres of state, political, economic, social and cultural life”. Moreover, the equality of women was to be constitutionally secured by several supportive provisions and institutions, such as equal pay for equal occupation; the right to social security, to education, to motherhood care and to paid leave; and the expansion of the network of maternity facilities, nurseries and kindergartens, etc. Even when the Constitution of 1952 cannot be treated as the real supreme act of the land in the legal hierarchy, its emancipatory potential cannot be underestimated.

In 1997, constitution-makers restored the basic meanings of the concepts already discussed. The constitutional term of ‘Nation’ is to be identified only with the political heterogeneous community of citizens being the source of power. The references to the ‘Nation’ are focused on constructing this community despite differences.¹⁴ As a matter of fact, ‘Nation’ has been replaced in the text by the general and more abstract term of “Republic of Poland”, which is, however, a key decisive subject (“the Republic guarantees”, “protects”). The guaranties afforded to the “Polish citizens belonging to the national minorities” are formulated broadly, but some of the phrases may raise questions. If the minorities “shall have rights to participate in the resolution of matters connected with their cultural identity”, does it create a particular form of participation in public affairs, or does it just recall the universal (i.e., for all citizens) right of self-determination?

Article 32 asserts that: “All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. No one shall be discriminated against in [...] the economic life [of the country] for any reason whatsoever.” Article 33 (1) stands out among the equality provisions: it is a direct declaration on the equality of women and men “in the family, political, social and economic life”.¹⁵ There was a vivid dis-

14 As observed more particularly in the Preamble: “We, the Polish Nation – all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources, Equal in rights and obligations towards the common good – Poland [...]”

15 With its extension in Article 33 (2): “Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal

cussion over this provision in the Constitutional Commission of the National Assembly as to whether such an emphasis on women's status was necessary in the context of the equality of "all persons" and the general prohibition of discrimination "in the political, social or economic life for any reason whatsoever", as expressed in Article 32.¹⁶ It was justified by "social needs" or "social regards", to which "legal and linguistic considerations must give way".¹⁷ It was also pointed out that the Constitution of 1952 had already included an analogical provision. Passing it over might have been understood as, somehow, a step back. Besides, special constitutional provisions have been made for disabled people, veterans and Poles abroad.¹⁸ According to the constitutional standard established in the jurisprudence of the Constitutional Tribunal, it is, therefore, possible to differentiate between groups of citizens, provided that it is proportionate, legal, equitable and justified.¹⁹

3 Who are those in power: how to distinguish and how to conceal (1935 and 1952 constitutions)

The Constitutions of 1935 and 1952 depart from the egalitarian framework. They define a society composed of groups and attribute to them, more or less directly, characteristics that impose a legal status on them. In both cases, the point of departure is a proclamation of solidarity and collectivism, even if they have been inspired by different ideological and political platforms.

The April Constitution of 1935 develops the concept of solidarity, which entitles selected groups of citizens to specific competencies. This Constitution puts the collective interest above the individual; the life of society is to be shaped "within and on the basis of the state"; and the state is to ensure "the free development of society", and "give it direction". The "common

compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations."

16 Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego (1995) No. 17, 65–76; No. 18, 5–10.

17 Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego (1995) No. 37, 90–91 (statements of senator Jerzy Madej and deputy Andrzej Gwiżdż).

18 Article 6 (2): "The Republic of Poland shall provide assistance to Poles living abroad to maintain their links with the national cultural heritage."

19 Ruling of the Constitutional Tribunal P 14/10 from 5th July 2011, OTK-A 2011 No. 6, Pos. 49.

good”, a category which may be understood fully arbitrarily, becomes the boundary of civil liberties. The clause that prioritizes the group over the individual is contained in Article 7 (1): “The citizen’s entitlement to influence public affairs shall be measured by the value of his/her effort and contribution to the common good.” Although the continuation of the article indicates that “neither origin, nor gender, nor nationality shall be the reason for limiting these rights”, the exclusive assumptions of the concept of solidarity became apparent in the Electoral Law, in particular in the 1935 Electoral Law for the Senate. Under this Act, only groups of citizens with a certain title or qualification were granted the right to stand for election as assessed by merit: as bachelors of decorations; by education: higher or secondary vocational education, or officer’s patent; and on trust, e.g., persons holding elected office in self-government.²⁰ It should be stressed, however, that this differentiation, unlike in many parallel European constitutions aiming at authoritarianism, was not based on an ethnic criterion. Moreover, as already mentioned, the leader of the ruling camp after the May Coup of 1926, Marshal Józef Piłsudski, decided that the new Constitution would not use the term ‘Nation’, but only ‘citizens’ and ‘state’, for fear that the nationalist opposition would interpret this term as referring exclusively to the Polish Nation.

The situation changed after the Second World War. The Constitution of 1952 introduced a system called a “people’s democracy” (Article 1). It was based on “an alliance between the workers’ class and working farmers” (also described as “working people of towns and villages” or “masses of the people”), who exercised state authority through their representatives (Article 2). From this categorisation, one may already deduce the basis for sub-dividing the general category of the Nation into the category of the working people of cities and villages, and those who will not be included in such a group. Supposedly, those who were excluded could be viewed as “the enemies of the Nation” (also referred to as “hostile forces”); indeed, under Article 79 (1), each citizen was obligated to “exercise vigilance” against these enemies. Obviously, among “the enemies”, “the capitalists” had to be identified (also referred to, in a more sophisticated way, as “the castaways of the old capital-

20 Article 2 of the Act of 8th July 1935 (the Electoral Law to the Senate, Journal of Laws No. 47, item 320). Cf. AJNENKIEL (1989) 193–194. One third of the senators were directly nominated by the President of the Republic of Poland (Article 1 (2)).

ist-landowner regime”), together with the “rich landowners” (Polish: “obszarnik”), whose “power was overthrown”. The category of “the enemies” was a deliberate understatement, liquid and capacious. Consequently, those in power could adapt it flexibly to changing policy objectives. In 1976, a constitutional amendment was adopted, introducing the phrase “the leading political force of society in the building of Socialism”, which was, of course, the Communist Party.²¹ The amendment was the cause of protests (known as the “Letter of the 59”), which contributed to the creation of opposition structures a few years later.

The understanding of the collective model was reflected in the provisions concerning economic issues. The economy in the Communist state was based on the idea of socialising the means of production (Article 7) and the widely described category of national property (e. g., mines, banks, state-owned industrial plants, and state-owned farms, in Article 8). According to Article 10, privately owned farms remained under state protection, but special support was nevertheless granted to agricultural cooperatives based on teamwork. While Articles 12 and 13 introduced protections for individual and personal property, these protections must be viewed as illusory or, at the very least, secondary, in the context of the broader legal framework. According to Article 48, courts were to protect, *inter alia*, “the people’s rule of law, social property and citizens’ rights” (in that order). Similarly, the protection of social property was a priority for the prosecutor’s office (Article 54), and even an obligation for citizens (Article 77).²²

The Amendment of December 1989 introduced fundamental changes to the system described above by introducing the categories of a democratic state of law that implements the principles of social justice (Article 1), and an open concept of the Nation exercising power through its representatives (Article 2). In the new wording of Article 7, on the other hand, the state “protected ownership and right of succession”. Moreover, it was emphasised that the Republic “provides full protection of personal property”, which

21 Ustawa z dnia 10 lutego 1976 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej (Journal of Laws No. 5, item 29).

22 Article 77: “Each citizen of the People’s Republic of Poland is obliged to protect social property and to strengthen it as the uncompromised basis for the development of the state, the source of wealth and strength of the Homeland.”

must be interpreted as a strong rejection of the constitutional rules of the Communist regime.

4 Constitutional provisions on religion

Among the generally egalitarian principles of the Constitution of 1921, the specific wording of the provisions devoted to the situation of religious associations is particularly noteworthy:

“The Roman Catholic religion, being the religion of the preponderant majority of the Nation, occupies in the state the chief position among recognized religions. The Roman Catholic Church governs itself under its own laws. The relation of the state to the church will be determined on the basis of an agreement with the Apostolic See, which is subject to ratification by the Sejm” (Article 114).

The Constitution also stated the right of the churches to govern themselves by their own laws, which the state may not refuse to recognize unless they contained rules contrary to the law. Instruction in religion was compulsory for all pupils in every educational institution. Also, the presidential oath included confessional elements (appeal to God in the Trinity). Some commentators interpreted this provision as an exclusion of non-Christians and atheists from the presidential office.²³ The Catholic Church was one of the most important political actors in the Second Polish Republic, being able to block progressive legislative bills, as in the case of the unified Marriage Law draft of 1929, which would have introduced civil marriages, divorces and full state jurisdiction over matrimonial issues in all Polish provinces.²⁴

The Communist Constitution remained almost silent about religion. Provisions were limited to the slogan of “freedom of conscience and the right to fulfil religious functions” attributed to the churches and religious associations. Paradoxically, it was prohibited to force the citizens *not* to participate in religious activities or religious rites. Finally, “the Church was separated from the state”. The hostile attitude of Communist leaders to the

23 The first Polish President elected in the interwar period, Gabriel Narutowicz, was probably an atheist. The confessional oath was also taken in 1947 by Bolesław Bierut, leader of the Communist Party. The wording of the oath referred to the 1921 version. BAŁA (2010) 164.

24 KRASOWSKI (1994).

Catholic Church and other religious organizations was to be spelt out at the level of ordinary legislation and, in particular, in administrative practice.

The 1997 Constitution's provisions, in Article 25, refer to the neutrality of the state and equality of rights of churches and other religious organizations. According to Article 25 (2), the authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life. The relationship between the state and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere (Article 25 (3)). Further provisions are devoted directly to the relations with the Roman Catholic Church, which shall be determined by the Concordat (concluded already in 1993),²⁵ and by statute (Article 25 (4)). Meanwhile, other churches and religious organizations are regulated by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers (Article 25 (5)). The provisions make the Roman Catholic Church of special importance and distinctive in relation to other churches and religious organizations.

The practice of the last decades proves that the position of the Catholic Church is privileged (e.g. the existence of the Property Commission, restoring Church property taken over by the Communist state, whose decisions were made on a one-instance basis and, in practice, were excluded from judicial control; the right to purchase agricultural property without meeting the requirements for natural persons; and, even, some elements of the jurisprudence of the Constitutional Tribunal).²⁶ In the political narrative, there are also postulates to anchor the special position of the Catholic Church in the Constitution itself. These developments may be interpreted in the context of current populist tendencies, as an element for building a homogeneous Nation based on the notion of a "conservative Catholic Pole", which, at the same time, differs from the inclusive concept of a heterogeneous nation, as included in the Constitution.²⁷ It is worth recalling the provision on the

25 Konkordat między Stolicą Apostolską i Rzeczpospolitą Polską, podpisany w Warszawie dnia 28 lipca 1993 r. (Journal of Laws 1998 No. 51, item 318).

26 Ruling of the Constitutional Tribunal K 17/93 from 7th June 1994; K 11/90 from 30th January 1991, OTK 1991 No.1, Pos. 2. Cf. BORECKI (2012).

27 BIEŃ-KACALA et al. (2019).

protection of marriage (“being a union of a man and a woman”) as well as the family, motherhood and, more generally, parenthood.²⁸ This provision is often referred to in the discussion on legalizing same-sex unions as a decision of the legislator that excludes this possibility, but there are also different interpretations emphasising the fact that the Constitution formulates special protection only for traditional marriages. The presidential draft of the constitutional amendment, which directly prohibits single-sex couples from adopting children, is also determined at least partly by religious reasons.²⁹

5 On the regulations of land ownership. What constitutions leave unsaid and what ordinary legislation says in the supra-constitutional reality

The protection of property was introduced already in the Constitution of 1921. Under Article 99, the Republic of Poland recognized all property, whether personal, collective or state-owned.³⁰ This provision provided that only a statute had the power to determine what goods could be considered

28 Article 18: “Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.”

29 This idea may be treated as playing politics as long as the draft was signed during the presidential campaign. Also, the amendment has been drafted in an ambiguous manner (it concerns, *expressis verbis*, “the person who remains in the same-sex relationship”) and was criticized for this reason.

30 “The Republic of Poland recognizes all property, whether belonging personally to individual citizens or collectively to associations of citizens, institutions, self-government, or the state itself, as one of the most important bases of social organization and the legal order, and guarantees to all citizens, institutions, and associations, the protection of their property, permitting only in cases provided by a statute the abolition or limitation of property, whether personal or collective, for reasons of higher utility, against compensation. Only a statute may determine to what extent property, for reasons of public utility, shall form the exclusive property of the state, and how far the rights of citizens and of their legally recognized associations to use freely land, water, minerals, and other treasures of nature may be subject to limitations for public reasons. The land, as one of the most important factors of the existence of the nation and the state, may not be the subject of unrestricted transfer (commerce). Statutes will define the right of the state to buy up land against the will of the owners, and to regulate the transfer of land, applying the principle that the agrarian organization of the Republic of Poland should be based on agricultural units capable of regular production and constituting private property.”

as exclusive state property and to what extent, and in what cases the rights of citizens and their right to the free use of property could be restricted. The doctrine was in agreement with the legislator's approach; Waclaw Komarnicki emphasized the fact that land, as one of the most important elements of ownership, "could not be subject to unlimited trade", and it was the Act that determined the conditions under which it was sold, acquired, or other activities related to it could proceed.³¹ A unique legal framework applied to properties secured in the form of *fidei-commissa*, which also impacted and protected the civil obligations of the owners.³² Under the democratic Constitution of 1921, the inherited structure of land ownership was preserved. In practice, this meant a privileged situation for the noble owners of large estates (also when the nobility was formally abolished) and for the Catholic Church, yet another major landowner. The Constitution of 23rd April 1935, under Article 81 (2), maintained Article 99 of the 1921 Constitution on property.

As indicated, the fundamentals of the economic system of the People's Republic of Poland were completely different. They were encapsulated by the category of "social property". Individual property remained in the background (when it came to be perceived as one of the components of the rather enigmatic "citizens' rights") or was not discussed at all. The Constitution cemented the model introduced by the ruthless agricultural reform carried out after the Second World War, which radically changed the structure of land ownership in favour of a small peasantry.³³ The state was to provide special assistance to agricultural cooperatives, which formally operated voluntarily (Article 10). From the end of the 1940s, special legislation, which implemented collectivist principles, also established special organizational units, such as State Agricultural Enterprises.³⁴

31 KOMARNICKI (1922) 567.

32 Fidei-commissa, called in Polish "ordynacje rodowe", were to dissolve according to the procedure introduced by the Law of 1939: Ustawa z dnia 13 lipca 1939 r. o znoszeniu ordynacji rodowych (Journal of Laws No. 63, item 417). NAWORSKI et al. (2020).

33 The land-depriving process violated, in many cases, not only "classical" civil ownership rights, but even the rules applying to Communist reform. It happened in many cases with properties in Warsaw that were taken over by the state on the basis of the so called "decree of Bierut"; Dekret Krajowej Rady Narodowej (KRN) o własności i użytkowaniu gruntów na obszarze m. st. Warszawy z 26 października 1945 r. (Journal of Laws No. 50, item 279). The consequence has been a large number of legal disputes and litigation lasting until today.

34 JAROSZ (1998) 109.

The Constitution of 1997 adopts the political, not ethnic, category of the Nation and applies it to the citizens of the Republic of Poland. It introduces a modern principle of equality and the prohibition of discrimination with the words: “equal in laws and obligations”, so that it repeats Article 32, already cited above. At the same time, the Constitution admits limitations in the exercise of constitutional freedoms and rights. Following Article 31 (3),

“any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.”

As regards the right to property, we must note that, in Article 21, the Republic of Poland shall protect ownership and the right of succession. Expropriation is allowed only if the public necessity requires it and with fair compensation. Besides, Article 64 of the Constitution states that everyone shall have the right to ownership, other property rights and the right of succession. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such a right. According to Article 22, on the other hand, “limitations upon the freedom of economic activity may be imposed only by means of statute and only for public necessity”.

Therefore, no indication of the issue of ownership differentiation or economic activity may be found. Nevertheless, in Article 23, the Constitution treats family-owned farms in a particular way, stating that “the basis of the agricultural system of the state shall be the family farm”. However, this principle must not affect the equal protection of property and the freedom of business activity.³⁵

In the light of the Act of 11th April 2003 on the shaping of the agricultural system³⁶ under Article 2a, only an individual farmer may be a buyer of agricultural property, unless the Act provides otherwise (in the case of matrimonial property, it is sufficient when one of the spouses is the individual farmer, and the area of the purchased agricultural property must not, as a rule, exceed 300 hectares of agricultural land). The subjective exclusions from

35 RAKOCZY/BIEŃ-KACALA (2015).

36 Journal of Laws No. 64, item 592 with amendments.

the scope of the above provisions include, among others, a close relative to the seller; a local-government unit; and legal persons acting on the basis of the provisions of the relationship between the state and the Catholic Church in the Republic of Poland, of the relationship between the state and other churches and religious associations, and of guarantees of freedom of conscience and religion, as well as the rights of inheritors. Other persons may acquire land if they give a guarantee of the proper conduct of agricultural activity and if there is no excessive concentration of agricultural land. The purchaser may be a natural person who intends to establish a family farm, who must have agricultural qualifications, or who has been granted support under specific programmes, including EU programmes, and who fulfils further detailed requirements.³⁷ The purchased property cannot be sold or given to other entities during this time. A family farm is considered to be an agricultural concern run by an individual farmer, with an agricultural area of not more than 300 ha (Article 5 (1)). Article 6 (1) specifies in detail who, in the light of the Act, is considered to be a farmer, indicating that such a person must have agricultural qualifications.³⁸ Therefore, the statutory regulation establishes far-reaching subjective and objective restrictions, which give the ownership of a family farm (Article 23 of the Constitution) an exclusive character. The equal constitutional provision derived from Article 64³⁹ is undoubtedly prejudiced, here.

6 Summary

Polish constitutionalism in the 20th century may be viewed as a process of evolution clearly bookended by the two democratic constitutions of 1921

- 37 Residency for five years in the local area (commune) where the family farm is created and located is required. The purchaser should also run the farm for 10 years and in person, if he (or she) is a natural person (Article 2b (1)).
- 38 "Qualifications" may mean a basic vocational agricultural education; a basic vocational, secondary, secondary vocational or higher education; or a qualification title, a professional title, or a professional title of a master in a profession that is useful for conducting the agricultural activity and a specific length of service in agriculture.
- 39 Article 64: "(1) Everyone shall have the right to ownership, other property rights and the right of succession. (2) Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. (3) The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such a right."

and 1997. In all cases under research – the 1921, 1935, 1952 and 1997 Acts – equality clauses formally belonged and still belong to the constitutional fundamentals. Yet, in each of the texts, one can find provisions favouring certain groups of citizens and vice versa, and the lack of a mention of a certain group in the context of equality provisions must also be perceived as a deliberate decision on the part of constitution-makers, with the full spectrum of consequences of such a decision.

Both democratic Acts, of 1921 and 1997, laid the groundwork for constructing, step by step, an equal society by abolishing previously existing provisions favouring certain social or political classes. ‘Anybody’ and ‘nobody’ is the basic phrase which defines the subject in the constitutional catalogues of rights and freedoms. Still, in the first case as generally formulated, constitutional equality was not successfully introduced even on a basic level, – whether it was the problem of the constitutional dominance of a certain religion, or a direct clash caused by provisions or constitutional violations maintaining old, ordinary legislation discriminating against certain groups (such as women), or privileging a certain group of landowners, for instance. The unconstitutional character under the 1921 Constitution could not be formally established as the Polish Constitutional Tribunal was not established until 1985. In the case of the 1997 Constitution, some reluctance to distinguish groups or to back affirmative action can also be observed. The Constitution only singles out the categories that are subject to the protection which is based on the principle of social justice, such as children, the youth, or disabled persons. The equality of women is emphasized as a separate area, which has obvious potential in legal argumentation. The constitution-makers of 1935 and 1952 did not dodge the issue of equality at all: on the contrary, it constructed the initial myth of the new political reality. At the same time, a certain group called to power was distinguished – on the basis of prior merit or prior discrimination. And yet, from the very beginning, when these constitutions came into force, these groups served as nothing more than a fig leaf for specific political factions.

To apply a comparative approach, the changeable understanding of ‘citizenship’ in Chile may be pointed to as the difference between the Chilean and the Polish cases. The concept of citizenship, which Polish constitutions of the 20th century deal with, is based exclusively on objective and binary dimensions: it just refers to “belonging to the state”. Limitations of voting rights, as regards legal capacity impacted by age or mental disabilities, are

not prerequisites perceived as derived from ‘citizenship’: they run parallel to this category, all the more so since the same rules apply to foreigners – European Union citizens – for instance, who are authorised to participate in the elections to the European Parliament and local councils’ elections during their permanent stay in Poland. So, Polish citizenship does not determine voting rights in the case of these elections: it is replaced by the construct of EU member states’ citizenship.⁴⁰ Of course at the time of the Old Polish Republic before the partitions (in the 1770s and 1790s), the notion of ‘citizen’ was identified with a person, i.e. a man belonging to the political ‘nation’ – a nobleman.

It is obvious that, in the search for the constitutional embedding of diversity, one should not stop analysing these obvious, eye-catching provisions. The constitutional equality principle can be violated in many different manners. It may take the form of setting this principle as general, regardless of provisions benefiting privileged categories and then, the potential collision must be solved by the constitutional judiciary. Also, on the grounds of formally equal regulations, one may build an exclusive interpretation and then, develop a similar constitutional practice as its aftermath (as in the case of the role of the Catholic religion in the public space). Another way is to adopt ordinary legislation that introduces extended requirements deviating from the constitutional provisions. The equality principle may also be enhanced by underpinning certain relations between categories, as in the case of women’s equality to men (1952/1997). That offers the possibility to question the constitutional nature of ordinary provisions by referring to a particular, higher-level norm. Consequently, such specific norm can be understood as a higher standard of protection, which is not provided for the groups protected by the general norm. Striving for equality may paradoxically result in its erosion in other fields. This illustrates how far-sighted and cautious constitution-makers must be, by relying on legal tools oriented towards equalization.

40 In the Ruling of the Constitutional Tribunal K18/04 of 11th May 2005, OTK-A 2005 No. 5, Pos. 49, the Tribunal expressly referred to “EU citizens”.

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Section II

**System and Codification – Exclusion
or Inclusion of Special Law?**

The Limits of Equality: Special Law in the Age of Legal Monism in Italy (19th–20th Centuries)

Diversity and legal protection are related issues that are set in dialectical terms in European legal experience during the 19th and 20th centuries. In fact, if we consider the problem of diversity and legal protection looking at the relations between the legal system and society, we can appreciate a tension between a “society *within* the legal order and a society *outside* the legal order”.¹ Society assumed in the legal system did not reflect real society, which, due to its complexity, was not entirely subsumable in the framework established by legal norms. The development of social rights, fundamental rights, or even human rights² could be considered as legal responses to this gap.

A key factor in this respect seems to be represented by the monistic configuration of the legal system, i.e. its tendency to reduce the multiform nature of legal phenomena, by assigning to some key principles a special ordering function: the principle of legality which reduced the regimes of normativity focusing on the core program for codification of statutory law; the principle of sovereignty which shaped the constitutional dimension in the absorbing gravity of the state person; the principle of equality which led a process of *reductio ad unum* of the social fabric in the legal scope. In this strong monistic configuration, the issue of diversity would have represented an implicit unsolved problem and a permanent challenge. The following pages will focus on this connection between the issue of diversity and legal protection with the configuration of the legal system.

First I will identify some particular features of legal monism in the 19th century in order to define the relationship between diversity and legal protection. Second I will provide a survey of how, in this historical context, monistic legal systems addressed the problem of diversity; in particular, the purpose will be to consider the function of special law. To this end, considering in particular Italian legal experience, I will take into account three

1 CAZZETTA (2016). See also ROSANVALLON (2011).

2 BOBBIO (1990); COSTA (2018).

examples that enable us to observe three different approaches to the issue: one relating to *inclusion*, another emphasizing *exclusion*, and a third focused on *anti-assimilation*.

1 Background and historical roots: Law and diversity between the modern and contemporary ages

In its history, legal protection seems to have been marked by the interchange of two major attitudes. On the one hand, the legal experience up to the 18th century is based on the idea of *distinguishing persons*. This approach appreciates the difference among multiple types of legal persons, and aims to implement a *principle of justice*, i. e. allowing the *just order* to be fulfilled, and thus provides *effective*, albeit *differentiated*, legal protection for all the members of society. On the other hand, the approach that characterizes the experience of the 19th and 20th centuries takes shape from the idea of *distinguishing the rights of the person*. This approach identifies and formalizes rights, unifies the legal person, aims to implement a *principle of liberty* and a program for equality, i. e. allowing the *proprium* of each individual to be fulfilled, and thus ensuring *provision* of legal protection for all members of society. From the point of view of legal history, it is especially useful to understand *what is in the middle between* the two attitudes (distinguishing persons/distinguishing rights) and to consider their dynamic interaction.

As a matter of fact, the invention of the rights of human beings, i. e. of legal protection related to a natural person as such, presents this ambivalence in *its very origins*. On the one hand, natural rights bring a new consideration of the link between law and diversity, providing a form of legal protection that consists in establishing the rights of the person; at the same time, as I will explain, these new rights of the individual have an eminently instrumental function: they serve to justify and allow the application in the New World of the traditional European legal order, based on the approach of distinguishing persons.

Take the example of the idea of natural rights in Iberian Scholasticism of the Early Modern Age, and in particular of the thought of Francisco de Vitoria.³ Here the problem is combined with the idea of allowing just order,

3 VITORIA (1967 [1538]), sectio III, 2, 4–9. See also SOTO (1545); ACOSTA (1596), lib. II, cap. XII, XIII; CASAS (1997 [1553]), vol. II, 934–948; MOLINA (1613), vol. I, tract. I, disp. 105.

of which *Respublica Christiana* is the bearer, to be introduced in regions of the world that still do not know this tradition, but that can (and must) be included in it. The problem of legal protection here (and of governance of diversity) is still a *problem of justice* (to enforce the *just* legal order).⁴ With this approach, rights, which are provided to the human being because of his *humanitas*, offer a place of occurrence in the New World for the traditional, social, and political pluralism that characterizes European legal space. In other words, we could say that in Iberian Scholasticism – even if the idea of rights of the human being is conceived – legal pluralism is, at the same time, the *premise* and the *outcome*.

The powerful laboratory of natural law thought, instead, emancipates itself from this approach. The new approach consists in enhancing a different performativity of rights and in addressing a different issue: to found a new foundation of legal order, and in particular to redefine the issue of individual freedom in relation to social cohesion. Here, rights are used to solve a *problem of liberty* (to protect the *proprium* of each individual). This perspective puts the problem of otherness in a different light, since it does not make it a problem to be included in the *just* legal order. On the contrary, it assumes diversity as a problem to be overcome in the framework of a new order that is based on formal equality and on a new rationality, in order to regulate the regimes of freedom of the individual.

This new approach makes it possible to link rights to *legal monism*. Up until this point, legal protection could only take place in relation to a general and abstract type of person (the natural person), and the legal order was configured as a system.⁵

I wanted to emphasize this premise by comparing the Iberian Scholasticism approach with that of natural law thought, because it is this second theoretical trend that, in my opinion, is embedded in the experience of the 19th century. Despite some relevant points of detachment from the approach of natural law thought of the Modern Age, the idea of linking in a monistic way the problem of social cohesion and that of rights of individuals (and consequently the approach to the problem of diversity), finds in this time its complete achievement.

4 MECCARELLI (2017).

5 It is the passage from the *Ordo* to the *Systema*, understood as paradigms of the legal system. See CAPPELLINI (1984) and CAPPELLINI (2010) 243–246; HESPANHA (2012).

2 Diversity and legal protection in the monistic legal systems of the 19th century

In the following pages I am going to describe some features of the monistic space for rights that we can find in European legal systems in the 19th century. I aim only to recall, in a very synthetic way, devices and legal figures well known to historiography, in order to better define the theoretical background of my analysis.

A. *Natural person as single and general type of legal person*: Doctrines of natural law see the rights of the person as individual rights which arise from a *pactum societatis* and also serve as tools to give shape to social structure; they are responsible for ensuring security to those who abandon the state of nature, and to define the regime of liberty compatible with civil coexistence. Legal order, therefore, is built on the basis of rights.⁶ This implies that this order is designed for an abstract and general type of legal person, in which each *socius* can recognize itself, in the same way as the others. The doctrines of natural law exclude the hypothesis of a legal order of differences. On the contrary, they support the idea of a single legal status in a legal system, as a consequence of the establishing of society.

It is important to outline that in the legal system of the 19th century, based on the primacy of statutory law and on the equality principle, reference to the abstract individual addressee of the legal provisions is actually a reference to a real socio-economic type: the bourgeois individual. As a matter of fact, legal protection that was equally provided for each person had a diverse impact in real society. This made possible, behind the screen of formal equality, to rule diversities without differentiating legal persons.

B. *Monistic reduction of legal-political structures in state form*: Theories of natural law on legal requirements for social cohesion lead to the idea of a unitary political power (*persona moralis*), emerging from the *pactum societatis* as the main actor in the constitutional dimension.⁷ The ordering factor here is not *iurisdictio*, which allows for the recognition of a plurality of powers inside the same legal order; on the contrary, here the ordering factor is

⁶ COSTA (2018).

⁷ A good example is Hobbes's theory of the construction of the social contract, which brings into play the absolute power of the sovereign: HOBBS (1904 [1651]), part I, ch. XIII–XIV; part II, ch. XVII.

sovereignty, which claims the original character, absoluteness, and uniqueness of political power and prevents the recognition of constitutional importance for different social bodies or territorial entities within it.⁸ The pages in which Rousseau shows us the indivisibility of sovereignty⁹ are exemplary. In Rousseau's legal order, social cohesion is only made up of individuals, the politically active citizens. Social bodies or territorial entities cannot affect or complicate that perfect sovereignty represented by the sovereign people.

This is the approach that knows renewed developments in the 19th and 20th centuries. Despite some relevant changes in the legal system, in these centuries the attitude to link rights and social cohesion in a monistic way was confirmed and consolidated.

C. *The idea of an equivalence between law and statutory law*: The assumption of an equivalence between of these concepts is related to a process of *reductio ad unum* of the sources of law and of overcoming the multi-normative dimension which was related to the different legal fields. This process, which takes place on both a theoretical and real level, was obtained¹⁰ with the use of two systematic instruments: the principle of legality (i. e. the idea that law must be produced only through the law enacted by political power) and the codification of law (i. e. a particular way of organizing legislative norms in relation to a main legal field, so that they present themselves as a closed and self-sufficient system of norms).

D. *Jurisprudence, case law, and hypostatization of law*: In the context of an equivalence between law and statutory law, jurisprudence and also case law change their function from sources of legal production to instruments that ensure law enforcement. It is a process that, not by chance, has roots in the theoretical turn of the Early Modern Age which discloses the perspective of the *Systema* in substitution for that of the *Ordo* and modifies the tasks of the jurist. The jurist's constructive activity, from the epistemological point of view, no longer responds, as in the culture of *ius commune*, to a reason that recognizes order from phenomenal reality. Modern reason insists on the human being, not on things. As Grotius explained, order is obtainable, *sicut mathematici*,¹¹ by way of abstraction. This new jurisprudence proceeds from

8 FIORAVANTI (2004) 47–68; COSTA (1999) 66–160; STOLLEIS (2008) 194–215.

9 ROUSSEAU (1762), lib. II, ch. IX.

10 GROSSI (2000); HALPÉRIN (2014) 1–34.

11 GROTIUS (1625), Prolegomena, post medium e ante finem.

axiomatic postulations and is carried out as a logic-deductive activity, oriented to the demonstration of truth.¹² It no longer draws from social facts to build and justify order; on the contrary, it is conceived starting from formal assumptions. In this way, jurisprudence carries out a new task: it aims to hypostatize rules and ordering categories and to promote the subsumption of the reality in them. This trend was completed in the 19th century, mainly thanks to the success of Savigny's approach to the study of Roman law as current law (*System des heutigen Römischen Rechts*) and its refinement in the conceptual construction of the *Begriffsjurisprudenz*.¹³

Also in this context, case law – think of the 19th-century success of the institution of supreme courts and courts of *cassation*¹⁴ – was configured as a tool of implementation of the positive law that checks the proper enforcement of statutory law. The production of case law is a way to support axiological and ideological options at the basis of the normative choices made by the legislator.¹⁵

E. *The programmatic value of the principle of equality and the subsumptive dynamic for providing legal protection*

The protection of individual rights implies consideration of different contexts (social, political, cultural, anthropological) and values (freedom, justice, solidarity, dignity, etc.) through the unique lens of equality. Before referring to a real socio-political context, the principle of equality promotes a project for social and political reality to create a society of free and equal citizens.¹⁶ This programmatic egalitarian attitude imprints a typical top-down dynamic in the relationship between rights enunciated in statutory law and social facts, since this kind of legal system is conceived to subsume reality in its norms.

The relationship between rights and equality is oriented in such a way; it is a matter of applying the programmatic egalitarian attitude to the relationship between the rights enunciated by law and the reality of social facts. Rights – thanks to the fact that they are provided for by statutory law *ex ante*

12 HESPANHA (2012) 307–358; TARELLO (1976); VILLEY (2013).

13 CAPPELLINI (1984); VANO (2000); HAFERKAMP (2004); RÜCKERT (1988 and 2011); REIS (2013); HESPANHA (2012 and 2013).

14 HALPÉRIN (1987); TARUFFO (1991); ALVAZZI DEL FRATE (2005); MECCARELLI (2005).

15 MECCARELLI (2011a).

16 FIORAVANTI (2009) 105–133; ROSANVALLON (2011); MECCARELLI (2017).

and in a general and abstract form – assume the position of a pre-established factor, the factor of invariance. The multiplicity of social configurations and the claims of legal protection can be traced to this factor of invariance. Equality, besides being the lens with which law ‘sees’ reality, gives shape to legal protection, in the sense that it conforms to a project for social and political reality.¹⁷

3 Regimes of legality and the governance of diversities

Monistic legal systems in the 19th century were designed to protect rights, but not on the basis of diversity. Of course modern law has been concerned with diversity, but necessarily only in an instrumental way if we consider that the core of its development has been represented by the issue of the individual before that of the society. For this reason, rather than legal discourse on diversity (that never takes the importance of an ordering factor of the legal order), legal experience in the Contemporary Age offers us many different legal solutions on diversities to provide answers on distinct and multiple fronts.

I would like to analyze below three types of responses to the problem of diversity implemented in the social, criminal, and colonial legal fields. A final example will be proposed in the conclusion that will concern a different kind of regime of legality. This will consist of the creation of a higher normative regime, the constitutional regime, together with the introduction of a new class of rights, such as fundamental and human rights, that would be unavailable to the sovereign political power of each state. This last development represents, in my opinion, the real inflection point of the monistic approach to the relationship between diversity and law.

3.1 Social issues and special statute laws: Integration of new areas of legal protection in the project for equality

Social issues during the 19th century represent a major challenge to the egalitarian construction of the civil code. As is well known, social change, as a result of the Second Industrial Revolution, led to the emergence of novel needs for legal protection, which the codified private law was not able to

17 MECCARELLI (2017).

provide. Problems linked to labor in industrial production – such as liability for accidents at work, social security, and health protection, including the features of the employment contract itself as a special contract – led to the emergence of a new sphere of rights, a new disciplinary area (social law and then labor law). Moreover, a complication in the framework of constitutionally relevant social actors arose: new collective subjects such as trade unions and mass political parties took shape.¹⁸

In this new scenario, social rights represented an important novelty for our theme: they responded to a different demand for legal protection, shifting the focus from the individual to social structure; they provided legal protection for individuals as collective rights; they assigned to the state an *obligation* “to do”, while the “traditional” civil rights required from the state an obligation “not to do”.¹⁹

Social rights are also interesting in another respect: the implementation of this new level of legal protection was, in fact, obtained through the use of *special legislation*. In response to the challenge of social issues, the Italian legal system responded by activating normative regimes, outside the scope of the codified law.

Let us ask ourselves the importance of this novelty with respect to the monistic legal configuration that I described in the previous chapter. First of all, we must consider that this novelty affected the *axiological framework* at the basis of the civil code. By means of social law it was a matter of improving a socio-economic function for private law; the consequence was also to draw a legal space for *social solidarity*, which was not included in the values protected by the civil code.

We know that this issue strongly questioned legal thought, in both private and public law, during the 19th and the first half of the 20th centuries; and we also know that the debate that followed resulted in several solutions, from the revision of the methods of interpretation of law, to a redefinition of the boundaries of legal fields (think of the idea of social law as an autonomous legal field to the discovery of comparative law),²⁰ to the proposal of a rewriting of the civil code as a code of private social law.²¹ In this wide and

18 CAZZETTA (2007 and 2017); GROSSI (2000); MARCHETTI (2006); GREGORIO (2013).

19 COSTA (2018); LONGO (2012).

20 PETIT (1995); HALPÉRIN (2001); PADOA SCHIOPPA (2001).

21 SABBIONETTI (2010); GROSSI (2000); CAZZETTA (2007); AUDREN (2013).

complex debate, we can find different attitudes towards the significance of special laws for the legal system.

In the Italian debate, in particular in the final decades of the 19th century, all special statute laws above were seen as a way of responding to the new social demand for legal protection, without destabilizing the basis of traditional private law in the civil code. Above all, it is the *dialectic between special statute laws and the code* that took importance in relation to the construction of the legal system.²² It was precisely the tension (or the axiological differential) between them, to offer the opportunity for the judge to play a role in the composition of the diverse interests and values protected by the different norms. This is a theme that was carried out by those jurists who, while considering the possibility of a social function for private law, still proposed a traditional vision of the legal system, based on liberal values and therefore, on the conceptual chain of natural person/equality/legality.

Biagio Brugi, Professor of Roman and civil law, offers an interesting example in this regard. In his vision, society, which is in continuous evolution,²³ induces changes in law; there is a “*latent law*” that can be discovered by the judge and the jurist, above all, through an evolutionary interpretation of the law.

Brugi sees in special law a useful and necessary instrument (“special laws are the only way for us to follow the development of the law”)²⁴ in order to grasp the change that society requires from the law and thus “*to face the ageing of the code*.”²⁵ Special law’s usefulness, Brugi notes, is greater in historical periods of transition like the current one, in which old and new interests from different sectors of society coexist. Special law considers new demands and brings out latent law without replacing and affecting the civil code. It also offers to jurists and judges the heuristic margin they would not have otherwise.²⁶

Through special statute law, new ordering principles can be introduced into the legal system: principles based on real and legitimate interests spread in society that express “ambitions and expectations in the national conscious-

22 GROSSI (1989); GROSSI (2000) 21–25; CAZZETTA (1991 and 2007); MECCARELLI (2011a).

23 BRUGI (1891) 172.

24 BRUGI (1905) 32.

25 BRUGI (1911a), vol. I, VII and 172.

26 BRUGI (1901) 167 and BRUGI (1889) 190–203.

ness". The function carried out, in the past, by customary law, adds Brugi, is now – in the most complex framework of industrial society – to be recognized in special statute law.²⁷ This special law brings out the new law and it does not matter if in a way it is not harmonized with the pre-existing law; it will be above all a duty of legal science to understand and *explain old and new law as a system*. The proliferation of special legislation is seen positively because it facilitates precisely that process of progressive construction of the legal system on the scientific level and, therefore, the groundwork for a more complete reform of statutory law, including also a new codification more in tune with the historical phase (and therefore, in Brugi's view, in the perspective of a new code of private social law).²⁸ For this *preparatory function*, the special law also has, in doctrines like this one, a systemic value.

There is one last aspect of his doctrine that deserves to be highlighted: it is a reflection made precisely in relation to the problem of the relationship between *law and diversity*. Special law represents the most suitable instrument to allow the legal system to *appreciate inequalities*;²⁹ special statute laws in fact "break the comfortable uniformity of the general laws"³⁰ and therefore serve to correct precisely those "abstract equalities" which each code tends to produce (the code binds the "inequalities of real life to a network of abstract equalities in which the greatest antitheses are forced"); special laws satisfy, therefore, the "need to bring the unforgettable diversities of the social substance back into legislation".³¹

27 BRUGI (1891) 96–97.

28 BRUGI (1889) 194–203; BRUGI (1891) 172.

29 BRUGI (1911b) 42: We gained "the beneficial persuasion that not infrequently it is appropriate to replace the abstract equality of a single law with certain differences of special laws, in order to treat differently, for the sake of justice, unequal quantities" ("la benefica persuasione che non di rado è opportuno sostituire all'astratta eguaglianza di un'unica legge certe diversità di leggi speciali, per trattare diversamente, a scopo di giustizia, quantità diseguali"). This awareness leads to "a sense of social equivalence of all, which is like a new aspect of legal equality" ("sentimento di una equivalenza sociale di tutti, che è come un nuovo aspetto della eguaglianza giuridica") (27). See also BRUGI et al. (1927) 15.

30 BRUGI (1908) 49: "they break the convenient uniformity of general laws".

31 The civil code reduces the "real-life inequalities in a network of abstract equalities in which the greatest antitheses are forced" ("le diseguaglianze della vita reale in una rete di eguaglianze astratte in cui sono forzate le più grandi antitesi"); special laws thus satisfy "the need to bring back into legislation the unforgettable diversity of social substance" ("il bisogno di riportare nella legislazione le diversità indimenticabili della sostanza sociale"), BRUGI (1908) 54.

I insisted on Brugi's thought because it seems to me very representative of the recurring arguments dealt with by doctrine on the function of special law and on its relationship with the civil code. The issue of the function of special laws – as a tool to face the phases in which old and new needs coexist – returns in several other works on the social function of private law, such as the well-known essay by Vittorio Polacco, *La funzione sociale della legislazione civile*³² or in the essay by Camillo Cavagnari, *Nuovi orizzonti del diritto civile*,³³ and in that of Enrico Cimbali, *La nuova fase del diritto civile negli rapporti economiche e sociali*,³⁴ just to mention a few.

The relativization of formal equality is another recurrent argument in this debate. Vittorio Polacco, this time in the pages of his other well-known essay *Le cabale del mondo legale* (The cabal of the legal world), reiterates Brugi's theses, outlining that special laws present the great advantage of taking into account “the *de facto* inequalities, by way of exceptions to the common law” (i. e. the law in civil code); this is understood from “the particular conditions of the various social classes”; it is a matter of considering “a living and palpitating reality more than all the systems conceived or conceivable by the aesthetes of law”.³⁵

In 1901, Bassano Gabba, reflecting on already thirty-year-old special social legislation, explains that the principle of “law-equality” must be replaced by the principle of “law-proportion”; it will no longer be the time for legal uniformity, on the contrary, it will be the time of legal specialty “that must be proportionate to the various conditions of the citizens”. In fact, if society is an organism, Gabba's discourse continues, law must then regulate the actions of individuals “so that these actions achieve, all in tune, a supreme purpose: the well-being of the organism”. In particular, law no longer performs a function of simple protection; rather it provides a function “of

32 POLACCO (1929) 35–37.

33 CAVAGNARI (1891).

34 CIMBALI (1907) 37–55.

35 POLACCO (1928) 51: “the real inequalities, due to exceptions in common law, if the particular conditions of the various social classes so require, a reality that is alive and throbbing more than all the systems conceived or conceivable by the aesthetes of Law” (“delle disuguaglianze di fatto, per via di eccezioni alla legge comune, se così vogliono le condizioni peculiari delle varie classi sociali, realtà viva e palpitante più di tutti i sistemi pensati o pensabili dagli esteti del Diritto”).

integration and improvement of the forces of individuals”. It will be “*law-integration*” rather than “*law-indifference*”.³⁶

The same attitude to understanding latent law, by way of the axiological differential between code and special legislation, is present in the writings of Francesco Carnelutti devoted to issues of labor law.³⁷ Carnelutti sees in social legislation *extra codicem*, not a mere exceptional or contingent law; on the contrary, he considers this as a place of occurrence of a “latent law [...] which is, independently of the norms of the codes, in the depths of social life”;³⁸ social law, by stressing the current common law (i. e. the law in civil code), allows the *emergence of a new law*, which the jurist can correctly identify and describe, by way of interpretation of the law.

In the first decades of the 20th century we can find this idea, together with the one that recognizes in special legislation a preparatory moment of new ordinary law, in the studies carried out by Pietro Cogliolo and Filippo Vassalli on *war legislation* related to civil law issues.³⁹ In particular, Cogliolo considers the axiological basis of special war legislation in two ways: first of all, it is an example of *ius singulare*, which – even though it represents “a deviation from fundamental principles, justified by extraordinary needs of time and place”⁴⁰ – is the bearer of its own *ratio* and “therefore it is not true that singular law should have no other interpretation than material and literal law; on the contrary, it is possible to penetrate its spirit and to enforce it, with the breadth that is compatible with the exceptional boundaries, in which and for which the singular norm was created.”⁴¹ Furthermore, special war legislation may also consist of norms which, although required from the war conjuncture, do not consist of exceptional measures; on the contrary,

36 GABBA (1901) 10–18: “non sarà più la uniformità, ma la specialità che dovrà appunto *proporzionarsi* alle svariate condizioni dei cittadini”; “in modo che queste riescano tutte intonate e dirette a uno scopo supremo: il benessere dell’organismo”.

37 CAZZETTA (2007) 192–202.

38 CARNELUTTI (1913) 8–10: “diritto latente [...] che sta, indipendentemente dalle norme dei codici, nell’intimo della vita sociale”. We can find the same attitude in CIMBALI (1907).

39 VASSALLI (1939); COGLIOLO (1916). See MOSCATI (2016).

40 COGLIOLO (1916) 5: “una deviazione dai principi fondamentali giustificata da esigenze straordinarie di tempo e di luogo”.

41 COGLIOLO (1916) 7: “perciò non è vero che la legge singolare non debba avere altra interpretazione che quella materiale e letterale, ma è invece possibile penetrare nel suo spirito e applicarla con quella larghezza che si concilia con i confini eccezionali nei quali e per i quali la norma singolare è stata creata”.

they “contain true principles of common law”. As a consequence, when the war will be over, “there will remain some rules created in wartime, which appear worthy of continuing even in peacetime”.⁴²

On the basis of these examples, we can try to derive some general evaluations on the significance of the juxtaposition of code /special statutory law with respect to the problem of the governance of social differences. It seems to me that, even though social issues introduced important innovations on performing legal protection, they did not cause a discontinuity with respect to the model of governance of diversity represented by the civil code.

In fact, it seems like it was a change of plan of action and not of the emergence of a form of legal protection with a different nature. The social question in the 19th century and for a large part of the 20th century was still addressed, above all, as a question of *liberty* (to be guaranteed even to those in socially disadvantaged conditions), in line with the original idea of providing rights in order to protect the self of the individual.⁴³ The other aspect connected to this problem, the claim of *justice*, seems to me to stay in the background.

As we have seen, the strong argument in support of social law was the gap between formal and substantive *equality*. The objective of social law is therefore a more effective enforcement of the principle of equality, so as to bind the performativity of rights to the new value of solidarity too. Paradoxically, the spaces of social rights are spaces where the programmatic aptitude of the principle of equality takes on more strength, because it gains a greater capacity to set itself in relation to the social facts. Special law in social matters is a legal sphere that adheres to society, but in line with the principle of legality; within the format of statutory law, it still performs in a subsumptive way.

In this use of special legislation we can, therefore, recognize an approach aimed at saving the framework of codified law, by integrating the process of implementing social protections into the program for equality, the same program that already characterized the protection of individual rights.

42 COGLIOLO (1916) 7, 8: “contengono dei veri principii di diritto comune”; as a consequence, when the war will have finished, “rimarranno tuttavia alcune norme create nel tempo di guerra, che si appalesano degne di continuare a vivere anche nel tempo di pace”.

43 BOBBIO (1990) 67–86; LONGO (2012) 8–17; CAZZETTA (2019).

One last remark is related to the propensity of Italian legal doctrine to carry out an integrated reading of codified law and special law. The commitment to an evolutionary interpretation of the law, in fact, is conceived as an interpretation of statutory law.⁴⁴ Therefore, it tends to remain within the perimeter of the principle of legality. The complication of the regimes of legality does not break the system of legal monism.

3.2 Political dissent and the double regime of legality in criminal law: an exclusionary function for special statute laws

Criminal law is the second area in which I would like to observe the relationship between special law and codified law in relation to the problem of diversity. Social law, indeed, represents only one side of the answer of European states to the social question during the 19th century; the other dark side is represented by exceptional criminal law, designed to neutralize the political dissent that arose from social claims.

In order to analyze this second example of special statute law let us consider, first of all, that the principle of legality represented the main ordering factor of penal systems on the European continent. In continuity with the ideas expressed during the Enlightenment (think, for example, of Beccaria's ideas),⁴⁵ statutory law, organized in the form of a *criminal code*, was used to perform as a monistic device, determining the normative fabric of criminal law, its functions, and its configuration as a closed system. Under this light, each form of criminal law needed to be included within the articulated scope of the codified law.

However, if we consider the regimes of legality during the 19th century, this statement seems to be only partially confirmed. Legal penal systems, indeed, consisted in a *dual normative regime*, an ordinary regime, i.e. the *penal code*, and a special regime, i.e. *special and emergency statute laws*. It is a matter of a quantitative growth and qualitative complication of the penal legal system, which can be easily observed in the phase of social and political change that characterized the end of the 19th century. In that conjuncture, the hegemonic rhizome of legality in criminal law (statute law as a toll to

44 COSTA (1989); GROSSI (2000); MECCARELLI (2011a).

45 BECCARIA (1965 [1764]), § I–V.

fully exercise sovereignty)⁴⁶ came back to emerge again. I am thinking in particular of the fight against anarchist and socialist political movements, that in Italy reached a dramatic turn in 1894 and 1898,⁴⁷ quite in synchrony with other European countries such as France, Germany, and Spain.

In these regions, economic and social changes produced by the Industrial Revolution stimulated the emergence of new forms of political organization connected to the exercise of freedom of association, like trade unions, mass political parties (in particularly related to socialist and anarchist ideals), which gave voice to discontent from the sectors of major social disadvantage. In this novel framework, political dissent took radical forms, very soon becoming an issue for the established social and political order; the conflict was perceived as a real “fight for survival”⁴⁸ for the ruling class in liberal states. The reaction to such a danger consisted in enforcing extraordinary measures in order to increase the capacity of social control and the level of punishment. In particular, these norms aimed to anticipate the possibilities of problems of those behaviors, which constituted possible premises for criminal facts, connected to political claims; the aim was, in fact, “to hit anarchism at its source”.⁴⁹ Sensitive areas of upcoming political rights were therefore being affected.

In the following pages I will analyze more closely the legislative response and the dynamics of the expansion of the penal system in Italy. I will also compare this experience with France’s in order to consider, with more elements, the function of special criminal law.

In Italy a brand new penal code (the so-called *Zanardelli Code* of 1889), which was in tune with the better standards of liberal legal culture,⁵⁰ had just been enacted when it came to issuing the emergency laws against anarchism and socialism. In that conjuncture we can observe, therefore, an interesting example of a dual normative regime in statutory law (which is a recurring dynamic in the Italian penal system).⁵¹

46 COSTA (2007); SBRICCOLI (2009 [2001]) 1240–1244; SBRICCOLI (2009 [2002]) 31–32; SBRICCOLI (2009 [2004]) 233–234.

47 COLAO (2007); BERTI (2009); MECCARELLI (2011b).

48 DIENA (1895) 318–319.

49 DIENA (1895) 306.

50 SBRICCOLI (2009 [1998]) 616–623.

51 SBRICCOLI (2009 [1998]) 592–597; LACCHÈ (2016).

In particular, political emergency was contrasted with the declaration of the *state of siege* (a siege against an enemy from within the state territory) in Sicily (January 13, 1894) and in Tuscany (January 16, 1894); besides the enactment of extraordinary measures, the suspension of ordinary criminal law and the enforcement of war criminal law would be issued. Moreover, on July 19, 1894 Parliament approved the so-called 'Anti-anarchist acts': nr. 314 which set new norms on crimes committed with explosive materials; nr. 315 which established new provisions on instigation to commit a crime and apologia for criminal offense, committed through the press; nr. 316 which provided special measures for national security conferring extraordinary powers to police authorities (a temporary act enforced until December 31, 1895). A second emergency happened in 1898: a state of siege was declared on May 7 and 9, 1898 in Milan, Florence, Livorno, and Naples. The act of July 17 nr. 297 brought back into force (until June 30, 1899) the temporary previous act nr. 316 of 1894, in order to provide urgent measures for the maintenance of national security and public order. The framework of the emergency legislation of the last decade of the 19th century was then concluded with one final measure: the enactment of a decree, i.e. an act with the force of a statute law, issued directly by the executive power, before it was discussed and approved by Parliament. It was the controversial decree of June 22, 1899 nr. 227, enforcing measures on national security and on the regulation of press; with these norms the government, chaired by Luigi Pelloux, intended to close the state of emergency by lending stabilization in a special law to the whole set of measures for control of political dissent, provided in the previous years by way of emergency law.⁵²

In this sequence of measures, we find three different forms of special criminal law: *declarations of the state of siege* acknowledged the state of (civil) war against the anarchist and socialist, in order to face this enemy with the special tools of war criminal law. *Special statutory laws* in order to neutralize political dissent added new specific measures to the discipline already provided for by the penal code. The *decree of the executive* tried to enforce

52 The decree nr. 227 (June 22, 1899) would be withdrawn on April 5, 1900. A few weeks earlier, in a famous ruling on February 20, 1900, the Supreme Court (Corte di Cassazione di Roma), by upholding an appeal by a convicted felon for an offense stipulated in that decree, considered the decree as having already expired as a consequence of another decree enacted from the government on June 30, 1899 in order to suspend Parliament (on the basis of the king's prerogative to prorogue Parliament's sessions).

emergency measures circumventing Parliament's scrutiny. The emergency measures mentioned above affected *freedom of assembly, of association, and of speech*, extending the field of action of the penal system, weakening the accuracy in the description of criminal offense, enriching the catalogue of criminal offenses, increasing the degree of penal punishment, and also allowing police control through preventative measures.

These kinds of special norms combined in ordinary penal law in two different ways: providing either *modifications* or *integrations of the normative regulation already available* or providing *new norms not to be included in the criminal code*. In both cases we can see a complementarity between ordinary and extraordinary rules: criminal code and exceptional measures composed together *a unitary normative framework* devoted to the protection of liberal political order.

In France the situation was similar: in response to anarchist terrorist attacks (but indirectly, also to socialist danger) extraordinary legislation was issued between 1892 and 1894: the act of April 2, 1892 provided alterations of articles 435 and 436 of the French Criminal Code (crimes committed using explosive materials); the act of December 12, 1893 provided alterations of articles 24 paragraph 1, 25, and 40 of the law of July 29, 1881 on the regulation of freedom of press; the act of December 18, 1893 enacted norms on conspiracy; the act of December 18, 1893 carried out alterations of article 3 of the act of June 19, 1871 on explosives; the act of July 28, 1894 enacted special provisions (including also preventative measures) in order to neutralize anarchist plots. Despite some relevant differences on the way to combine special law and criminal code, French and Italian cases reveal the same axiological approach.⁵³

Here, too, it was a matter of targeting the organization of political dissent, including in the scope of criminal law. In the French case, no different from what would happen in Italy a couple of years later, freedom of association, of assembly, and of speech were affected. From the point of view of legislative regimes, also here exceptional norms had the effect to *widen the penal system*, modifying the existing ordinary discipline and providing completely new norms. In parliamentary debates such as in legal doctrine⁵⁴ emergency measures were presented as complementary in relation to other penal norms.

53 For a more in-depth analysis, see MECCARELLI (2011b).

54 JOUSSEAUME (1894) 6 and 43–44; LOUBAT (1895) 5.

A meaningful similarity between the Italian and French cases can be found in the legal discourse on these provisions. This can be seen first of all by considering the arguments to justify the dual level of legality that was given in the legal debate both in Italy and in France. The recurring argument – a similar discursive approach found in countries such as Spain, in which in that same phase the problem of political dissent was dealt with⁵⁵ – is that of the *defense of social order* against the subversive projects expressed by the anarchist and socialist political movements. From such absolute threat – and not just “for the safety of a determined state, but for *all civilized society*”⁵⁶ – the state was legitimized to defend itself using appropriate special measures.

It is interesting to consider that the criminal relevance of political dissent was perceived as a consequence of an *abuse* in exercising political rights.⁵⁷ Jean Casimir-Perier, at that time Prime Minister, during the parliamentary debate on the law of December 12, 1893, spoke about the need for a “*social preservation*”⁵⁸ against the anarchist threat; it was to face political actors (and persons) which put themselves in contrast with *every kind of social organization*.⁵⁹ As a matter of fact, this last argument is very significant, those measures did not affect the freedom of citizens: they were only directed towards those “*who put themselves outside society*”.⁶⁰

The Italian Minister of the Interior and Prime Minister Francesco Crispi also argued on the *abuse of constitutional guarantees* in order to justify exceptional measures.⁶¹ In a statement of August 9, 1894 addressed to the heads of the local government administration (the *prefetti*) giving guidelines on the enforcement of the three anti-anarchist acts of July 1894, he explained that “the use of law cannot be without rules; freedom cannot be without a discipline” and “our democratic monarchy must support the greatest individual, political, and social freedoms secured by the order firmly preserved”.⁶²

55 MARTÍN MARTÍN (2009).

56 DIENA (1895) 318: “pour la sécurité d’un État déterminé, mais pour toute société civilisée”.

57 ROLIN (1894) 126.

58 JOUSSEAUME (1894) 58.

59 DIENA (1895) 318; ROLIN (1894) 125–126.

60 Lois annotées (1894) 649: “qui se sont placés eux mêmes hors de la société”.

61 COLAO (2007) 708.

62 CRISPI (1894) 34, parte II, 360: “l’uso del diritto non può stare senza una regola; la libertà non può stare senza una disciplina” and “la nostra Monarchia democratica deve offrire lo

The argument of social preservation against the “impolitic destructiveness” of some political actors⁶³ highlights a “performative’ aptitude” of the legal measures against the enemy,⁶⁴ and also an *ideological short-circuit* in the liberal discourse on political rights. It is on this basis that the nature of a “political crime” was not used for crimes with an anarchist foundation.⁶⁵ The fact of denying the *political nature* of this kind of crime had the outcome of excluding them from the special treatment accorded by the law to crimes of opinion. For example, we can think of the refusal to grant extradition, or the requirement of a jury in trial.

In this perspective the distinction between instruments for the *protection of moral order* and for the *protection of social order* is also relevant. If the *protection of moral order* has an object limited to immoral behavior, the *protection of social order* is broader, including any behavior potentially dangerous “to political order and to state order.”⁶⁶ The criminal code would aim at the *protection of the moral order*; special legislation, instead, would be devoted to the *defense of the social order* (of that social order assumed as being the only possible order), to neutralize the threats to its very own existence.⁶⁷ By specializing the function of norms, the dual regime of legality allows the penal system, when facing the issue of political dissent, to deal with the twofold issue of *preserving the effectiveness of political rights* and *denying their abuse*.

That is why we argue that special criminal law would be structurally necessary to the very centrality of the criminal code. The differentiation of normative regimes ensured that political dissent could be addressed by special instruments, and, at the same time, prevented, to reconsider the setting of criminal code in order to deal with the unsolvable latent contradictions of the liberal legal system, stressed between protection of individual freedom and protection of the established order. The dual regime of statutory law is considered, therefore, as a device conceived in order to defend the constitutional foundation and the configuration of this legal order. They were the

spettacolo delle maggiori libertà individuali, politiche, sociali assicurate dall’ordine saldamente mantenuto.”

63 ALESSI (2011) 122; see also MARTÍN MARTÍN (2009) 899.

64 COSTA (2009) 5.

65 DIENA (1895) 319–322; ROLIN (1894) 126–129.

66 ARANGIO RUIZ (1896).

67 ARANGIO RUIZ (1896); UGENTI SFORZA (1893–1899) 56; ROLIN (1894) 126; JOUSSEAUME (1894) 58.

foundation and configuration of a *conformative* kind, whose attitude was to refuse inclusion (or even to ensure exclusion) of new socio-political phenomena to the liberal model.⁶⁸ In that kind of legal order there was no margin to incorporate social diversity in the project for civil coexistence.

For this reason – to return to considering the ideological short circuit which emerged above concerning the *abuse* of political rights – the exercise of political dissent was protected as a freedom insofar as it was consistent with the fundamental values of liberal order; but whenever it became a vehicle of promoting a new model of society, political dissent challenged the holding capacity of that rigid constitutional foundation, becoming a problem to be solved with criminal law.

What we have tried to highlight shows how criminal law is a relevant field for analyzing the relations between ordinary (codified) law and special statute law; here special legislation is exceptional legislation, which is therefore characterized by a tension to exclude the social field's potential or real enemies of the established order. The maintenance of legal monism and the implementation of the program for equality needed such exclusionary devices.

3.3 Colonial exception and colonial special law: an anti-assimilating approach to governance of diversity

A third example of special law applied to the problem of diversity can be investigated within the colonial context in the 19th and 20th centuries. Colonial law consists in a special legal regime, legitimated precisely from the idea that colonial diversity is irreducible and incompatible with respect to the egalitarian understanding of the legal system. This was a consequence of the fact that colonial territories seemed to belong to a different space-time configuration in relation to the standards of civilization.⁶⁹

According to this premise, Italian legal science of the first half of the 20th century (especially after World War I) recognized in colonial law a specific scientific discipline, as attested to by the growing number of studies in this field⁷⁰ devoted to the search for foundations, boundaries, and features; this

68 CAPPELLINI (2011); COSTA (2009) 14–16; CAZZETTA (2009).

69 COSTA (2004/2005 and 2009); NUZZO (2004/2005); MEZZADRA/RIGO (2006); MARTONE (2008); BASCHERINI (2009 and 2012); BASSI (2018). See also KOSKENNIEMI (2001) 11–178; PETTIT (2002); SOLLA SASTRE (2019).

70 BERTOLA (1943). See COSTA (2004/2005).

represents quite an autonomous legal field in relation to the others arisen during the 19th century.

In 1918 Santi Romano – a reference author in the field of constitutional and administrative law – published a course on colonial law.⁷¹ In his work, he drew the traits of the discipline in relation “to the various branches of public and private law”, identified its “formal and material” sources, and defined its nature as special law. A similar attitude aimed at defining the domain of colonial law can be found in many other contributions. Even if the theoretical edification does not seem to have achieved conclusive results,⁷² it is evidently a commitment to explore the possibility of a *dogmatic understanding* of colonial law,⁷³ or to describe its *principles*,⁷⁴ or to consider colonial law in a *theoretical* and *historical perspective*.⁷⁵ Colonial law takes the features of a legal *system* that admits internal partitions⁷⁶ such as public law⁷⁷ or labor law,⁷⁸ private law, administrative law, penal law, international law, procedural law, comparative law, etc.⁷⁹ It is much more than just a special kind of statutory law: it is a “single discipline”⁸⁰ that includes various branches of law. The scope of its specialty is also reinforced by corresponding special jurisdiction.⁸¹

There are many issues that could be taken into account considering colonial law. Here we want to focus in particular on the features that make this legal field *special*. As Romano explains, it is a “*non-exceptional special law*”: its norms are differentiated from the ordinary norms of the state, nevertheless colonial law is still a “normal law”. It is not special *per se*, as in the case of exceptional law that consists in “anomalous” law, due to conjuncture (for example situations of war, emergency, etc.); colonial law, explains Romano,

71 ROMANO (1918).

72 MARTONE (2008) 30–44.

73 CIAMARRA (1915).

74 BORSI (1938a); TAMBARO (1934).

75 MALVEZZI (1928); MONDAINI (1908 and 1939).

76 BORSI (1938a) 120–121. See also MALVEZZI (1928) 15–16.

77 GIANTURCO (1912); ARCOLEO (1914).

78 PERGOLESI (1938).

79 BORSI (1938a) 123–127; CUCINOTTA (1933).

80 ROMANO (1918) 21.

81 ROMANO (1918) 196–202; MALVEZZI (1928) 255–280; CUCINOTTA (1933) 216–308; BORSI (1938a) 289–335. See MARTONE (2002 and 2008); BASCHERINI (2009) 255. On the different systems of mixed jurisdiction applied to the semi-colonial territories, see FUSAR POLI (2019).

appears special only when compared with another law that rules similar objects. The specialty of colonial law, in other words, is a consequence of the fact that it applies to a special territory (the colony) within the state.⁸² The same approach is also confirmed in later works such as those of Umberto Borsi: the specialty is the consequence of the “adaptation of rules and legal institutions to the environmental conditions which they refer to”.⁸³ In fact, colonial and metropolitan law are “two kinds of territorial law” enforced in different parts of the territory of the state.⁸⁴

Colonial law is, therefore, conceived as a separate legal regime, albeit within the same state legal order.⁸⁵ Metropolitan and colonial law represent two separate particular spaces within a single legal space. Coessential to the concept of the colony is the impossibility of a fusion with the metropolitan territory. Colonial law is incompatible with an assimilatory paradigm; it has, indeed, an anti-assimilatory function.⁸⁶

In order to explain this, it is necessary to consider the axiological foundation of the autonomy of colonial law which is twofold: it serves to support the “social function of colonization”, i. e. the “moral conquest” of the colonized peoples, “associated with the exploitation of the natural resources of the territories inhabited by them”.⁸⁷ This composition of these two tasks – to civilize colonial people and to satisfy the interest of the civilizer state – is an

82 ROMANO (1918) 22–23, 28–31 and 101–114; CUCINOTTA (1933) 62–63.

83 BORSI (1938a) 130: “La specialità del diritto coloniale, che non è anomalia od eccezione, bensì adattamento delle norme e degli istituti giuridici alle condizioni dell’ambiente al quale si riferiscono.”

84 BORSI (1938a) 129. See COSTA (2004/2005) 195–199; BASCHERINI (2009) 258.

85 CUCINOTTA (1933) 5–6.

86 ROMANO (1918) 33, and also 111–113: “A colony, in fact, that has been amalgamated and has become an integral part of the metropolis is no longer a colony” (“Una colonia, infatti, che sia stata fusa e sia diventata parte integrante della metropoli non è più colonia”). See COSTA (2004/2005) 208–210; SOLLA SASTRE (2015).

87 BORSI (1938a) 8: “Il fine diretto” of the colonizing states “più che il perfezionamento di altri popoli in sé stesso, è la conquista morale dei medesimi associata allo sfruttamento delle risorse naturali dei territori da essi abitati”. The clarification on p. 9 is also meaningful: “Behind abstract ideal statements it is always necessary to seek the reality of concrete spiritual or material interests of the colonizing states, which however in our time often coincide with those of the colonized countries.” (“dietro le astratte enunciazioni ideali occorre sempre ricercare la realtà di interessi concreti spirituali o materiali degli Stati colonizzatori, che però al tempo nostro coincidono spesso con quelli dei paesi colonizzati.”)

important aspect, since it defines the particular notion of the specialty of colonial law.⁸⁸

Colonial law differs, therefore, from the previous examples we have considered: in the case of social law, the special legal regime was aimed at the integration of new subjects and social phenomena into the equality initiative; in the case of criminal emergency law, the special legal regime corresponded to an exclusionary strategy (the enemies of society must be placed outside society); colonial law shows us an anti-assimilating approach in employing special law. These last two look very similar. The anti-assimilation approach, however, does not represent the exclusion of colonial subjects from society, as was the case of the enemy of society within criminal emergency law; the colonial subject is still a member of society, he is subjected to its rules; although special, they are normal rules according to the cultural and anthropological gap of colonial space / time.

The aim of assigning different legal statuses to different natural persons is obtained through a distinction between citizens and colonial subjects:⁸⁹ citizens are considered as *subditi optimo iure* (i.e. “constituent elements of the state”); this is a quality not recognizable in colonial subjects which are only constituent elements of the colony (moreover, the quality of colonial subjects does not correspond to a general and unitary status; on the contrary it “may be different according to the different colonies belonging to the same state”). As a consequence, colonial subjects “do not have fullness of political rights, as far as the public life of the metropolis is concerned”.⁹⁰ More generally, according to this understanding we can observe that the former are citizens within the national legal system and a subject on the international level, the latter are always subjected also to domestic law (i.e. they cannot claim rights against the state as, on the contrary, happens in the case of citizens).

88 This approach is also present in other works, for example see ROMANO (1918) 105–114, in particular 107–108; MALVEZZI (1928) 8–14; GIAN TURCO (1947). The mix between civilizing function and satisfaction of economic interests of the colonizing state as a feature of colonial politics is also corroborated by the critical analysis of CIMBALI (1906). See COSTA (2004/2005) 173–191; PETIT (2002) 578–589; CIANFEROTTI (1984) 15–61.

89 ROMANO (1918) 123–127; BORSI (1938a) 234–240 and (1938b); CUCINOTTA (1933) 189–209. See COSTA (2004/2005) 217–227; MEZZADRA / RIGO (2006) 179–185; MARTONE (2008) 1–44; NUZZO (2004/2005 and 2006); BASCHERINI (2009) 272–276; FALCONIERI (2011) 46–62.

90 ROMANO (1918) 125; CUCINOTTA (1933) 189.

We can ask ourselves if this anti-assimilating approach reproduces the pluralism of legal persons in the first colonial period, the Modern Age, more focused on the American chessboard. In fact, the two phases are only apparently in continuity.⁹¹

In colonial law of the 19th and 20th centuries, the anti-assimilating approach implied a withdrawal of the principle of the uniqueness of the legal person. In the Modern Age, on the other hand, the approach, although discriminatory, remained inclusive, since its aim was to include Indigenous diversity in an order of diversities already based on multiplicity of legal persons. The former assumes a monistic comprehension of the legal order, the latter a pluralistic comprehension.

There is also a second relevant difference which concerns the pre-understanding of the relationship between the legal order and territory.⁹² In the Modern Age, as we have already considered, the invention of natural rights was linked to a strategy to expand the European legal order towards the *possible space* to which the discovery of the New World had opened up. The invention of natural rights (which, in fact, not by chance are *ius peregrinandi*, *ius communicationis*, and *ius dominium*) essentially served to make it possible to operate in that possible space with the legal instruments of *ius commune*. This approach to otherness aimed at inclusion, but in the absence of an agenda for equality. The invention of rights allowed a communication system between Spanish and Indigenous people that implied for Indigenous people an obligation to conform to European organizational and cultural models.⁹³ As a final consequence, a hierarchization of society was improved through the establishment of a protective relationship (*tutela*) between European and Indigenous people. In this approach remains an understanding of the relation between legal order and territory based on a pluralistic paradigm of *iurisdictio*.

If the Modern Age is based on the suggestion of possible space, the colonial approach in the Contemporary Age assumes a different space to give shape to legal forms: that of the *decided space*. It implies the idea of a necessary interdependence between political power and territory intended in

91 One can also grasp the self-perception of specificity in the process of colonization of the contemporary age, compared to the former colonial system. See for example HARDY (1937) 2–63.

92 For a more in-depth description of the topic, see MECCARELLI (2015).

93 Nuzzo (2004 and 2004/2005); NEUENSCHWANDER (2013).

a particular perspective: it is the process of affirmation and delimitation of political sovereignty that determines the territory in terms of the identification of external borders as well as its internal structure. From a theoretical point of view, the process of manifestation of political power stands before the delimitation of territory, so that space is decided by sovereignty. This scheme which has roots in natural law thought and in particular in Hobbes' theory, is durable and reproduces itself in subsequent contexts. A mature outcome is represented by the doctrines of the state in the late 19th and in the early 20th centuries. We can think of the *Allgemeine Rechtslehre*⁹⁴ (Italian legal thought is also aligned on these positions)⁹⁵ that emphasizes the state as a form of life (*Lebensform*), and in which the notion of territory remains a constitutive element,⁹⁶ corresponding to the personality of the state,⁹⁷ for the *Dasein* of the state.⁹⁸ Italian legal thought is also aligned on these positions.⁹⁹ This view is strengthened on the level of international law, which "accentuates the real nature of the state":¹⁰⁰ it recognizes the idea of political boundaries that delimit "a specific portion" of territory.

This understanding of the territory as a decided space makes geopolitical reality the object of subsumption in the legal format of the sovereign state, and makes history a place of implementation of this process. All that supports the operational model of colonial expansion is connected to the parable of national states. Although this requires an update of the traditional idea of state sovereignty, in the perspective of the implementation of the new

94 STOLLEIS (2008); MEZZADRA/RIGO (2006) 185–186.

95 FIORAVANTI (2001); SORDI (2003).

96 KJELLÉN (1917) 46–93, here 47–48: "Thinking of the land separately from the state has the consequence of evaporating the concept of state itself"; "Without land there is social existence, but nothing more" ("Wir koennen das Land aus dem Staat nicht wegdenken, ohne dass der Staatsbegriff sich verflüchtigt"; "Ohne Land gibt es gesellschaftliche Existenz, aber mehr auch nicht").

97 KJELLÉN (1917) 57: Territory "is the body of the state" ("Körper der Staates"); "it is the state itself" ("ist der Staat selbst").

98 JELLINEK (1914) 395–396: "The necessity of a delimited area for the existence of the state has only recently been recognized" ("Die Notwendigkeit eines abgegrenzten Gebietes für *Dasein* des Staates ist erst in neuerster Zeit erkannt worden").

99 FIORAVANTI (2004); SORDI (2003).

100 FISCHBACH (1922) 78–79: "International law emphasizes the substantive character of the state in almost all relations with its territory. Here the national territory is a piece of the earth's surface" ("Das Völkerrecht betont den sachenrechtlichen Charakter des Staates zu seinem Gebiet in fast allen Beziehungen. Hier ist das Staatsgebiet ein Stück der Erdoberfläche").

geopolitical concept of *empire*,¹⁰¹ we can say that during the first half of the 20th century, colonial space was essentially understood as a projection of national sovereignty of civilized countries.¹⁰² It is, moreover, a persistent approach if we consider that in 1948, the United Nations Charter (chapters XI and XX) still provided for the *trusteeship* of colonial territories in order to promote the progress of these territories and their entry into the international community.¹⁰³

The paradigm of decided space in conceiving the relationship between the legal order and territory is, then, embedded also in the colonial discourse of the 19th and 20th centuries. This means that colonial expansion is not detached from the monistic paradigm developed in Europe. The creation of a special legal regime for colonies and its anti-assimilatory function in relation to the issue of diversity has to be understood as a coherent consequence of this.

4 Concluding remarks

At the end of this survey, we can make a few brief concluding remarks. This overview aimed to show three different examples of the use of special legislation as a tool to rule diversity in monistic legal systems. It seems to me that this is confirmed in the starting statement: in the 19th and 20th centuries, legal systems tended to provide multiple responses to the problem of diversity; nevertheless, diversity did not take the prominence of a structuring category in the legal system.

Social law put in place a strategy for integration of diversity within the framework of the equality initiative; criminal emergency law (which con-

101 On this topic see the in-depth analysis proposed by COSTA (2004/2005) 229–252. See also MEZZADRA/RIGO (2006).

102 KOSKENNIEMI (2001) 98–178; COSTA (2004/2005) 252–257; MEZZADRA/RIGO (2006) 180–181; NUZZO (2012); LORENTE SARIÑENA (2010) 217–234; AUGUSTI (2013); FUSAR POLI (2019). As HARDY (1937) 452 already observed: “What seems to dominate in the origins of contemporary colonization are the intentions that are strictly political. For every nation, colonial policy is now a component, sometimes the most prominent, of its foreign policy” (“Ce qui semble dominer dans les origines de la colonisation contemporaine, ce sont les intentions proprement politiques. Pour chaque nation, la politique coloniale est désormais un élément, quelquefois le plus marquant, de sa politique extérieure”). See ROMANO (1902); MONDAINI (1902 and 1907).

103 NUZZO (2006). See also COSTA (2004/2005) 187–189.

cerned the same social phenomena, but considered their political importance) tended instead to implement a strategy aimed at excluding the enemies of society; colonial law tended to introduce anti-assimilating devices and dynamics in legal order.

Although these three different special normative regimes were performing different functions, they however shared one basic element. They were all consistent with the monistic configuration of the legal system, albeit in different ways. In fact, these were spheres of normativity and all an expression of the sovereignty of the state. The fact that they were opposed to certain principles of the metropolitan legal system did not call into question the fundamental function of those principles.

Special law, facing social and geopolitical challenges, performed as an instrument capable of renewing the perspectives of meaning for the axiological function of legal configurations of European states. This made it possible to implement a differentiated strategy to deal with emerging diversities, with the result to offer new legitimacy to the legal systems that were bearers of the universalistic program of equality. Legal monism, facing its own limits, showed its full hegemonic potential.

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System and Codification – Exclusion or Inclusion of Special Law? A German Perspective

Did systems and codifications of private law in Germany push aside special laws or were these incorporated? The question as posed is obviously firmly grounded in modern theories of diversity. It revolves around equality as a political concept and it implicitly asks whether the “tendency of law towards equality”,¹ no doubt stamped on legal developments since the 18th century, was, amongst other factors, fuelled by two questions that at first sight might seem merely technical. The first, hotly debated in the course of the 19th century, asks whether, and if so how far, law is a system. Those who asked it appear more often than not to have assumed that special laws could not be fitted within this system but actually were in quite clear contradiction of it and therefore constituted a technical impediment. The second question, related to the technique of legislation, asks how special law can be incorporated into a codification without transgressing the corresponding normative context? If one views codifications as legal systems turned statute law, the second question is closely tied up with the first one. In addition, as codified systems claim to steer societies as a whole, a political dimension accrues to it: Codifications emphasise validity for and applicability to all. How do special laws fit into this context?

Part of this second question can be readily answered. Codifications assumed the primacy of statute law: all legislation in force was meant to be found here. As early as 1975, Heinz Mohnhaupt made it clear that the older world of chartered privileges had, in the course of the 19th century, been sidelined by codifications. Special laws had, therefore, changed their character from individual rights granted by a sovereign to a specific person, family, corporation or group, to statutorily defined rights for an abstractly defined part of the society. The technical meaning of ‘privilege’ now reflected this change and absorbed the differentiation between statutory and chartered

1 PUCHTA (1841) 19: “Zug des Rechts nach einer Gleichheit”.

special rights.² Nevertheless, the jurisprudential writings that we examined dealing with the demonstration and establishment of a scientific system only consider the special legal provisions as a problem. Their focus is on the many instances of a *ius singulare*, i. e. extraordinary rights or obligations not separately granted to or imposed upon specific individuals but rather addressing abstractly defined groups of persons by means of statute. Particular instances include the countless special provisions for minors, the elderly, soldiers, women, widows or merchants which from antiquity onwards have characterised Roman law, church law and then the *ius commune*. We will therefore probe the theoretical debates using what may be the most prominent of these *iura singularia*, the Senatus Consultum Velleianum which, from Justinian's time on, prohibited the intercession of wives on behalf of their husbands. Is the slow and gradual displacement of this 'benefice' an expression of systematic considerations?

1 System and *iura singularia*

Turning to the first question – whether system and *iura singularia* clashed with each other –, an observation made in 1798 by Anton Friedrich Justus Thibaut deserves attention.³ Thibaut was at the forefront of those who rose to Immanuel Kant's call to 'scientificate' jurisprudence. His "System des Pandekten-Rechts" (1803) manifestly marked the transition from *jurisprudencia* to *jurisscientia*,⁴ while his attempt to bundle all positive law under one prime principle also illustrated his view of special law. He criticised the prevalent contemporary understanding⁵ of *ius commune* – the sum of those provisions applicable "to all" ("für alle") –, whereas *ius singulare* was commonly assumed to comprise those provisions which were meant only "for a certain class of subjects".⁶ But almost always, Thibaut argued, laws would pertain only to a very limited number of persons; even particular types of contracts would be applicable only to those concluding such contracts. This criticism revealed the actual, ideological grounding of the contemporary

2 MOHNHAUPT (1975) 78.

3 THIBAUT (1817) 238.

4 SCHRÖDER (1979).

5 MOHNHAUPT (1975) 84 et seqq.

6 THIBAUT (1817) 238: "eine gewisse Classe von Unterthanen".

view of special law whereby special laws were recognised as such if the choice of the respective group of addressees answered to any politically significant or motivated differentiation. In good logic, these were rather fluent boundaries. Through this criticism, Thibaut demanded, on the one hand, a more transparent approach. Underlining the importance of political considerations, he carefully distinguished provisions “of a strict, natural or civil law” (*ius commune*) nature from those which, “for reasons of politics or equity”, formulated an exception to the rule (*ius singulare*). By doing so, Thibaut resurrected the age-old definition in D. 1,3,16: “Ius singulare est, quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est.”

On the other hand, he not only stressed *utilitas* as the reason behind legal exceptions, but also raised the question of how system and special law could be combined. *Ius singulare* constituted an exception to the rule, which explained the position of special laws in the system: They were amendments to the rules of the respective areas of law. At the same time, it was pointed out how these norms “to that extent deviated from the general strict rules of law”, as Thibaut phrased it in those passages from his textbook that deal with the SC Velleianum.⁷ For the rest, Thibaut remained silent: no other conclusions were drawn from his positionings of *ius commune* and *ius singulare*. In particular, there is no evidence that his systematic conceptions put the SC Velleianum under any strain or that the need was felt to rid the system of discordant exceptions. In any case, Thibaut did not believe in an inherent systematic structure of law. Rather, all he asked of jurists was that they structure legal provisions in a pragmatic as well as systematic manner, always with the proviso that a “perfected system [...] was] impossible”. That is why he should not be criticised, if “every now and then the logical decorum were not observed”.⁸ Carving up legal material in order to achieve an especially conclusive system was therefore not a viable path for him.

Most 19th-century Pandectists will have thought along these lines. Of a pedagogical vocation, Pandectist systems aimed to render the corpus of legal material easily accessible to students. Thus, special laws were simply added as

7 THIBAUT (1834) § 603, 131: “und insofern es von allgemeinen strengen Rechtsregeln abweicht, zu den Arten des iuris singularis gehört”.

8 THIBAUT (1803) 3: “vollendetes System [...] für unmöglich”; 2: “hin und wieder das logische Decorum nicht geachtet seyn sollte”.

an exception. To omit them or to limit their academic treatment for systematic reasons was deemed nonsensical because students were taught the law then current, and that law still retained a host of special laws. If one looks for jurists pondering not merely didactic but more explicitly scientific systems – a group which could have dedicated more effort to our topic –, one finds a surprisingly small number of academics. From the end of the 1820s onwards, the discussion about such systems reacted to criticism from the Hegelian camp. This criticism was directed at the disciples and followers of Friedrich Carl von Savigny, who were charged with being unable to present a scientific system. At the centre of this debate stood Friedrich Julius Stahl, Georg Friedrich Puchta, Moritz August von Bethmann-Hollweg, Friedrich Bluhme and Savigny.

In 1840, Savigny followed Thibaut's lead⁹ and stressed that *iura singularia* could not be characterised as being of application only to "a certain class of persons", "as the definition of such classes can be formulated at discretion, like for example the whole law of sales only applies to the class of seller and buyer".¹⁰ He, too, foregrounded the relationship between rule and exception, deploying it as a logical connection between *ius commune* and *ius singulare* and speaking of "anomalous" principles which had not sprung from the "pure area of law itself", but from "an alien place".¹¹ Savigny argued that rules in which he saw the "common element"¹² of law at work were rooted in the "moral nature of law in general [...], i. e. the acceptance of a universal dignity and liberty of man".¹³ According to Savigny, *ius strictum*

9 SAVIGNY (1840) 61.

10 SAVIGNY (1840) 63: "gewisse Klasse von Personen"; "da man den Begriff solcher Klassen nach Belieben bilden kann, wie denn z. B. das ganze Recht des Kaufs nur für die Klasse der Käufer und Verkäufer gilt".

11 SAVIGNY (1840) 61: "Ein zweyter Gegensatz bezieht sich auf die verschiedene Herkunft der Rechtsregeln, je nachdem dieselben entsprungen sind auf dem reinen Rechtsgebiet (sey dieses jus oder aequitas), oder aber auf einem fremdartigen Gebiet [...]. Indem diese letzten als fremde Elemente in das Recht eingreifen, werden dessen reine Grundsätze durch sie modificirt, und insofern gehen sie contra rationem juris [...]. Ich nenne sie daher anomalische, die Römer nennen sie Jus singulare, und setzen ihren Entstehungsgrund in die von dem Recht verschiedene utilitas oder necessitas."

12 SAVIGNY (1840) 55–56: "das allgemeine Element".

13 SAVIGNY (1840) 55: "Das allgemeine Element dagegen erscheint wiederum in verschiedenen Gestalten. Am reinsten und unmittelbarsten, insofern darin die sittliche Natur des Rechts im Allgemeinen wirksam ist: also die Anerkennung der überall gleichen sittlichen Würde und Freyheit des Menschen."

and *aequitas* formed the sources from which the “common element” originated. They had to be kept quite distinct from norms of *ius singulare*, which were emanations of “paternal care for the welfare of individuals (*ratio utilitatis*), for example the advancement of trade, the protection of some classes, like women and minors, against specific dangers”.¹⁴ The starting point was to be found in “every kind of *utilitas*”.¹⁵ Savigny’s views evidently owed much to a strong commitment to systems: “As the latter, as foreign elements, interfere with the law, its pure principles will be modified by them.”¹⁶

2 The technique of change: merging or coexistence of rules and exceptions?

It would be Savigny’s disciples who looked more closely at possible answers to the question of whether modifications to extant law through *ius singulare* should be incorporated by means of a change to the existing rules themselves or whether they should be allowed to exist alongside them as exceptions. Was the aim of jurisprudence to weave a *ius singulare* into the fabric of the *ius commune* by changing legal rules and principles to such an extent that any exception could be dispensed with?

For Puchta, it was the basic principle of law to govern the inequality of people and of things on the principle of equality. Thence, the task of integrating individual demands into an increasingly differentiated legal system.

“The more a law develops, the more open it will become to demands resulting from the differing nature of men and of things; the less brusque and hard, the more elastic its forms will become, in which it will envelop them without letting go of its basic principle. [...] But this pure development has often been interrupted. The demands resulting from the individual nature of men and of things have often asserted themselves in a way that lead to them being placed above the principles of law, instead of them being inserted into those principles. This gave rise to exceptions to the pure law. [...] It is not the influence of these individual considerations that characterizes the *ius singulare*, as the pure law, too, cannot and should not seal itself against this influence, but rather the manner of the same [sc. the influence], namely, that it exerts itself by the external way of an exception breaking through the

14 SAVIGNY (1840) 56.

15 SAVIGNY (1840) 56: “jede Art von *utilitas*”.

16 SAVIGNY (1840) 61: “Indem diese letzten als fremde Elemente in das Recht eingreifen, werden dessen reine Grundsätze durch sie modificirt”.

principles, thus transcending them, instead of satisfying all demands by a corresponding shaping of the legal institutes themselves.”¹⁷

This naturally raised the question of why a legal order sometimes held particular positions of individuals apart by means of contrasting special laws and sometimes integrated them into the *ius commune*. To Puchta, three explanations seemed possible:

“The reason for choosing, instead of the latter way, the former, the erection of a *ius singulare*, will not seldom be found in a lack of sensible insight and of the command of the material on the part of the legislator; often also in the particular character of a certain right, that is, in the legal opinions of the people itself; and finally, in the imperfection of all things human generally, which precludes the absolute achievement of that idea of a pure law, which is the inner perfection of law.”¹⁸

Puchta illustrated his points by taking the SC Velleianum as an example. Donations between spouses, he explained, had been prohibited in Roman law because “it is irreconcilable” with the Roman conviction “that the spouses were held to consider all that they owned as common goods, if one may enrich himself to the detriment of the other”.¹⁹ The prohibition

- 17 PUCHTA (1841) 92–93: “Je mehr ein Recht sich ausbildet, desto vollständiger wird es sich den Ansprüchen der verschiedenen Natur der Menschen und der Dinge öffnen, desto weniger schroff und hart, desto elastischer werden die Formen werden, in die es sie einschließt, ohne sein Grundprinzip aufzugeben. [...] Aber diese reine Entwicklung ist oft durchbrochen worden. Es haben sich die Ansprüche der individuellen Natur der Menschen und der Dinge häufig in der Art geltend gemacht, daß sie über die Principien des Rechts hinweggesetzt wurden, statt in sie eingefügt zu werden. Dadurch sind Ausnahmen von dem reinen Recht entstanden. [...] Nicht der Einfluss jener individuellen Rücksichten ist es, worin der Charakter des *ius singulare* liegt, denn diesem Einfluss kann und soll sich auch das reine Recht nicht verschließen, sondern die Art und Weise desselben, nämlich daß er auf die äußerliche Weise einer die Rechtsprincipien durchbrechenden, also sie überwindenden Ausnahme geübt wird, statt daß jenen Ansprüchen durch eine entsprechende Gestaltung der Rechtsinstitute selbst genügt würde.”
- 18 PUCHTA (1841) 93: “Daß statt des letzteren Wegs jener erste, die Aufstellung eines *ius singulare*, eingeschlagen wird, hat seinen Grund nicht selten in einem Mangel an rechter Einsicht und Beherrschung des Stoffs von Seiten des Gesetzgebers, häufig auch in dem besonderen Charakter eines gewissen Rechts, also in den Rechtsansichten des Volks selbst, endlich aber in der Unvollkommenheit menschlicher Dinge überhaupt, welche die vollständige Erreichung jener Idee des reinen Rechts, also die innere Vollendung des Rechts ausschließt.”
- 19 PUCHTA (1841) 93: “Im römischen Recht sind die Schenkungen unter Ehegatten verboten [...] Der Grund liegt darin, daß es mit dem sittlichen Wesen der Ehe, mit der wahrhaften ehelichen Gesinnung, wonach die Ehegatten alles was sie haben, als gemein betrachten sollen, unverträglich ist, wenn sich einer auf Kosten des andern bereichern will.”

itself had resulted from developments in Roman family law. Whereas in the traditional form of marriage, the *manus*-marriage, the husband received complete legal control over all of his wife's assets, that was not the case with free marriages, which thus legally allowed for a donation. There would have been two ways of reacting to this problem. The first would have been root and branch modification to the matrimonial property regime and the implantation of "free common ownership of goods between the spouses, which could have solved this problem". But by destroying the proprietary aspects of (*manus*-)free marriage, such an approach "was alien to the legal sense of the Roman people". A solution involving changes of the *ius commune* was therefore ruled out.

"The only way was to break through this pure law with a singular exception, the prohibition of donations, to let it [i.e. the pure law] be defeated by individual considerations, instead of giving a form to that pure law in which it would have accommodated this requirement and would thereby have remained in command of the same."²⁰

Thus, the legal conscience had to decide whether an exceptional provision could be integrated by modifying the principle or whether it had to be included as an exception. What underlay this was the conviction that the legal conscience did not simply function like an organism, but sometimes eluded the rules of the system. Puchta thought of the law as being of a reasonable nature, "even though, of course, necessity may from time to time lead to a deviation from these consequences".²¹ Bethmann-Hollweg clarified the point in 1840:

- 20 PUCHTA (1841) 94–95: "Es ließe sich denken, daß der Rechtssinn des Volks, indem er über jene älteste Form des ehelichen Verhältnisses hinausgieng, eine neue rechtliche Gestalt desselben gefunden hätte, die, obwohl weniger schroff, jene sittliche Anforderung in sich aufnahm, und ihr somit auf dem Standpunkt des reinen Rechts genügte, eine rechtliche Gestalt, wodurch die Schenkung ebenfalls nach reinem Recht unmöglich geworden wäre. Unsere rechtlichen Anschauungen führen uns auf eine freie Gemeinschaft der Güter unter den Ehegatten, wodurch dieses Problem hätte gelöst, und die an die Stelle jener alleinigen Berechtigung des Mannes hätte gesetzt werden können. Aber dieser Begriff war dem Rechtssinn des römischen Volks fremd [...] So blieb nichts übrig, als dieses reine Recht durch eine singuläre Ausnahme, jenes Verbot der Schenkungen, zu durchbrechen, es durch die individuellen Rücksichten besiegen zu lassen, statt dem reinen Recht eine Form zu geben, worin es dieses Bedürfnis aufgenommen hätte und dadurch desselben mächtig geblieben wäre."
- 21 PUCHTA (1847) 25: "wiewohl freilich unter Umständen das Bedürfnis zu einer Abweichung von diesen Konsequenzen führen kann".

“As in the whole history of the peoples, in the development of their law, too, there is an unknown factor at work, an x. No people is completely aware of the unity of its law, to a greater or lesser extent it merely carries it in its emotions. It is precisely for that reason that it does not produce its law in absolute unity but instead, prompted by the diversity of life and by a practical need, it will leap-frog links and develop details which are now characterized as anomalies, as exceptions.”²²

No victory of the system, therefore. Jurisprudence followed the existing sources of the law, and it was not always possible to integrate legal rules into the organism. But of course, the challenge remained to achieve the best possible integration by changing the guiding principles. Keller went so far as to hold that, despite their opposition, “consequence and utility [...] have their place within the legal system and that is where they demand their equalisation.”²³ Kuntze was far more sceptical:

“*Aequitas (bonum et aequum)* is different from the logical elements of law which can be deduced rationally and demonstrated exactly, and which are therefore pure products of thinking; the *aequum* is a product of creation, a free unfolding of the substance, a creative expansion of the legal lineaments, but borne by the basic ideas of the law und thereby distinguished from the mere laws of utility which only form mechanical additions and – to a greater or lesser extent – always bear the sign of arbitrariness.”²⁴

Another, more careful way was suggested by Bluhme. He pointed to the fact that special law could crystallise into whole, irregular complexes of law. His examples were “the laws of soldiers, Jews, feudal law, commercial law, shipping law, mining law, forest law etc.” He argued that such complexes of

22 BETHMANN-HOLLWEG (1840) 1573 et seqq., 1580: “Wie in der ganzen Geschichte der Völker, so auch in der Entwicklung ihres Rechts wirkt eine unbekannte Größe, ein x mit. Kein Volk ist der Einheit seines Rechts sich vollständig bewußt, es trägt sie mehr oder weniger nur im Gefühle. Eben deshalb producirt es auch sein Recht nicht in absoluter Einheit oder Consequenz, sondern durch die Manigfaltigkeit des Lebens und das practische Bedürfniß gedrängt bildet es mit Ueberspringung der Mittelglieder Einzelheiten, die nun den Character der Anomalie, der Ausnahme haben.”

23 KELLER (1866) 17: “Consequenz und Utilität [...] gehört aber in das Innere des Rechtssystems und fordert in demselben seine Ausgleichung.”

24 KUNTZE (1869) 17: “Die *Aequitas (bonum et aequum)* unterscheidet sich von den logischen Elementen des Rechts, welche rationell deducirt, exact demonstrirt werden können und also reine Producte des Denkens sind; das *aequum* ist ein Product des Schaffens, freie Entfaltung des Stoffes, schöpferische Erweiterung der juristischen Lineamente, aber getragen von den Grundideen des Rechts, und dadurch unterschieden von den bloßen Utilitätsgesetzen, welche nur mechanische Zusätze bilden und immer mehr oder minder das Gepräge der Willkür tragen.”

special law “can only be raised to the status of an organic entity, to an intelligible representation of real life, through multifarious amalgamation with related and more general principles”.²⁵ In any event, the system was not allowed to brush away any provision of the special law. According to Puchta, nothing was gained “by not dealing with a real anomaly, i. e. one not rooted in other provisions of the system, right where one encounters it, but instead pushing it deeper into the system”.²⁶ These discussions, revolving as they did around the theory of a legal system, did not contemplate special law as a systematic tool. No one was fond of it, and there were marked attempts to integrate the contents of the respective provisions of special law by adjusting the principle. But where that failed, the provisions remained in force, as exceptions in flat contradiction of the rule. Puchta, for instance, treated the SC Velleianum as a general prohibition of intercession by women and thus as an exception to the rule.²⁷ Other Pandectist systems also added the SC Velleianum as an exceptional law to their respective systems and merely documented the deviations from Roman law in contemporary *ius commune*. There is nothing to indicate that in order to uphold systematic consistency any thought was given to sacrificing these deviations and the SC Velleianum in favour of the general rule of freedom to intercede.²⁸

3 Codification and *iura singularia*

But what about the codifications? At first glance it seems even more unlikely that *iura singularia* which still fitted the political bill would be pushed aside due to technical legislative concerns. The science of legislative theory unan-

- 25 BLUHME (1854) 16: “nur durch vielfaches Einweben verwandter allgemeinerer Grundsätze [sic] zu einem organischen Ganzen, zu einem verständlichen Bilde wirklicher Lebensverhältnisse erheben lassen”.
- 26 PUCHTA (1826) 40 et seqq., 41: “dass man, statt eine wirkliche (d. h. nicht auf andere Sätze des Systems zurückzuführende) Anomalie gleich wo sie sich zeigt, einfach als solche abzufertigen, sie weiter ins System hineinschiebt”.
- 27 PUCHTA (1844) §§ 407–410 (541–544), mentioning that court practice had recently supplied another exception from the general prohibition of intercession by women, namely in cases in which the intercession pertains to the woman’s own commercial activity (§ 408 [543]).
- 28 Cf. for instance GÖSCHEN (1839) 527 et seqq., including 536 et seqq. (“Heutiger Gebrauch”); VANGEROW (1852) 149 et seqq. (including note 1), collecting the many exceptions the *ius commune* allowed, compared to Roman law.

imously declared that the legislator “was expected to base his laws on a systematic foundation [...] but should refrain from encroaching on the field of science by directing this system at the outside.”²⁹ It was deemed sufficient to first formulate the rule and then the exception.³⁰ *Iura singularia* therefore posed no technical legislative problem. This was stressed by Gottlieb Planck – member of the first and chairman of the second BGB commissions – in his remarks regarding the issue of whether women’s capacity to contract was to be restricted under certain circumstances. Openly weighing up the systematic benefits of a general solution with the legal-political implications, he pointed to the ultimately secondary importance of issues of system: ³¹

“Seen from the point of view of juristic technique, there would indeed be certain benefits, and the simplicity of the system would be furthered if, regarding the matrimonial property regimes of community of property and of matrimonial usufruct and administration [i.e. the so-called “Verwaltungsgemeinschaft”], a limitation of the legal capacity of the wife were introduced [...] But such a step would threaten the interests of the wives to such an extent, would fail to comply with the economic needs as well as with the general social opinions, that this seems too high a price for the gain of a simpler system.”

Planck emphasised this view: “Alas, the position within the system is of merely secondary importance.”³²

Does this mean that the integration of *iura singularia* into the codification did not play any role as a legislative technique? Planck, in particular, had a very keen eye for the legislative-technical challenge posed by special laws. 1889 saw his debate with Otto von Gierke, whose continuous criticism that

29 MERTENS (2004) 423: Legislative theory was in agreement that the legislator “zwar seinen Gesetzen ein System zugrunde legen [...] aber nicht in das Gebiet der Wissenschaft übergreifen [solle] indem er dieses System nach außen kehrt.”

30 MERTENS (2004) 427.

31 PLANCK (1889) 352: “Vom Standpunkte der juristischen Technik aus würde es allerdings gewisse Vortheile gewähren und die Einfachheit des Systemes gewinnen, wenn man bei den Güterständen der Gütergemeinschaft und der ehelichen Nutznießung und Verwaltung eine Beschränkung der Geschäftsfähigkeit der Ehefrau eintreten ließe [...] Eine solche Gestaltung würde aber das Interesse der Ehefrauen in solchem Maaße gefährden und den wirthschaftlichen Bedürfnissen, wie den Anschauungen des Lebens so wenig genügen, daß der Gewinn eines einfacheren Systemes um diesen Preis als zu theuer bezahlt erscheint.”

32 PLANCK (1889) 338: “Die Stellung im Systeme ist aber doch nur von untergeordneter Bedeutung.”

the First Draft of the BGB's insistence on equality would favour the strong over the weak was its salient feature. Against a backdrop of heated political debate in the wake of the economic crisis of the 1870s ("Gründerkrise"), von Gierke's criticism was tantamount to accusing Planck of overlooking, or even disregarding, the present social demands in the most naïve manner possible. Planck's reply was fuelled by his conviction that the first task of a codification was to set up "general rules"³³ and to codify only that which was "open to a general regulation".³⁴ Should this be impossible, Planck said, he tended towards either "leaving the decision to the legislation of the federal states"³⁵ or calling for "special legislation".³⁶ The task of the codification was, then, to regulate what was applicable to all. Normative deviations favouring or burdening particular groups were better contained in and restricted to special statutes.

The old distinction between general principles on the one hand and exceptions springing from political considerations on the other thus resurfaced in Planck's writings as a principle of legislative technique. Planck clearly distinguished between the question of *how* a particular legal relationship was to be regulated and *what* the appropriate *place* for it was – within or outside the codification. Particularly in cases where this would have meant taking sides in the socio-political struggles of his day, Planck was averse to integrating special law into the codification.

"Therefore, far-reaching social innovations are – as far as is reasonably possible – to be left to the legislation in the form of specialized acts [Spezialgesetzgebung], be it the legislation of the Reich or, as appropriate, of the federal states. Intervention in such circumstances as are still developing, in particular, is to be ruled out."

This position reveals an attempt – as a reaction to severe criticism of the First Draft of the BGB (1889) – to depoliticise the codification and to remove controversial political issues. Thus, Planck lauded the legislator for prohibiting usury again, employing a special law and thereby avoiding the need to integrate the prohibition into the BGB – to Planck's mind it was an instance of "the correct distribution of the material"³⁷ between codification and special law.

33 PLANCK (1889) 335: "allgemeine Grundsätze".

34 PLANCK (1889) 336: "einer allgemeinen Regelung fähig".

35 PLANCK (1889) 336: "die Entscheidung den Landesgesetzen überlassen".

36 PLANCK (1889) 343: "Spezialgesetzgebung".

37 PLANCK (1889) 410: "principiell richtige Vertheilung des Stoffes".

Behind this rather technical argument stood Planck's decidedly liberal stance towards private law as well as his rather sceptical view of special law. By relegating special law to special statutes, Planck's conception of the BGB embodied a liberal space for individuals as well as for the market and thus made plain his socio-political standpoint. From this perspective, the "security of commerce" superseded the protection of the weak through codified special law. Planck refused outright to heed von Gierke's call for the protection of the weaker to be enshrined within the BGB and taken as axiomatic:

"The BGB, however, must never give preferential consideration to the interest of one class but should – by weighing all interests concerned – enact whichever provision serves the common weal best. [...] The most important factors of economic power and weakness, wealth and poverty, cannot be used at all in private law as preconditions of legal rules. Neither can it be claimed as a general rule that the debtor is the weaker party vis-à-vis the creditor. Thus, any decision will depend on the close analysis of the individual legal relationships, but particularly on whether the preconditions, demanded as given by a provision protecting the weak, as well as the very contents of that provision, can be defined in such a manner that – at least usually – application of this provision will indeed only result in the protection of the weak and not act to the detriment of the security of commerce as well."

For that reason, the draft of the BGB had eliminated a number of provisions which were deemed not to "have achieved their aim at all, or only very incompletely, but which have instead proven to be a troublesome nuisance for healthy and honest commercial relationships." As examples, Planck mentioned "the restriction of suretyships of women, rescission for reasons of *laesio enormis*, the Lex Anastasiana etc."³⁸

- 38 PLANCK (1889) 409: "Das bürgerliche Gesetzbuch aber darf niemals das Interesse einer Klasse vorzugsweise berücksichtigen, sondern muß unter Abwägung aller in Frage kommende Interessen die dem Wohle des Ganzen am besten entsprechende Bestimmung treffen. [...] Die wichtigsten Factoren wirtschaftlicher Macht und Schwäche, Reichthum und Armuth, lassen sich im Privatrechte überhaupt nicht als Voraussetzungen von Rechtssätzen verwenden. Ebenso wenig läßt sich allgemein behaupten, daß der Schuldner gegenüber dem Gläubiger der Schwächere sei. Es wird daher immer auf eine genaue Prüfung der einzelnen Rechtsverhältnisse ankommen, besonders aber darauf, ob sich die Voraussetzungen, unter welchen ein zum Schutze des Schwachen bestimmter Rechtssatz Anwendung finden soll, sowie der Inhalt dieses Rechtssatzes selbst so bestimmen lassen, daß dadurch wenigstens regelmäßig wirklich nur der Schwache geschützt wird und nicht daneben andere schwerwiegende Nachtheile für die Sicherheit des Verkehrs eintreten. Von diesen Gesichtspunkten hat sich der Entwurf leiten lassen und wenn über einzelne

Yet again, the SC Velleianum served as an example which Planck used to rank the protection of wives below the requirements of the market. This chimed nicely with demands from the political mainstream which had been calling for the abolishment of restrictions on interceding for quite some time.³⁹ But the reason why the BGB now opted against the limitation of intercession was of a different nature. Among other things, the Commission wanted to set up the codification as a symbol of private law itself. It was here that society's general liberties were enacted, a default model applicable as long as the state did not opt to intervene. This was nothing short of a defence of private law against von Gierke's call to amalgamate private law and public law. Viewed as the codification of private law, the BGB therefore necessarily threatened special law in all those cases in which the Reich refrained from intervening through counter-legislation, that is, through specialised statutory law. To that extent, and only to that extent, there was a connection between codification and special laws.

4 A glance over the Alps

Comparison of these German debates with the late 19th-century Italian discussion, as analysed in Massimo Meccarelli's contribution,⁴⁰ shows how both discourses share a common premise: codifications are to be stable while areas of law which are still in flux, prone to constant changes or politically charged should be kept at bay and legislatively outsourced. Behind this lies a shared reluctance to open up a codification for re-negotiation. Whether that reluctance was due to already sufficiently complicated and unpredictable legislative discussions about the respective bill (cf. the history of the BGB)

Fragen die Meinungen auch geteilt sein mögen, im Großen und Ganzen, wie ich glaube, den richtigen Mittelweg festgehalten. Er hat eine Reihe von Vorschriften beseitigt, welche zum Schutze des Schwachen bestimmt waren, so z. B. die Vorschriften über die Beschränkung von Bürgschaften der Frauen, über die Anfechtung wegen *laesio enormis*, die *lex Anastasiana* u. a. m. Es handelte sich hierbei durchweg um Bestimmungen, von denen sich herausgestellt hatte, daß sie ihren Zweck überhaupt nicht oder nur höchst unvollkommen erreichten, dagegen andererseits den gesunden und ehrlichen Geschäftsverkehr in hohem Grade belästigten und vielfach zu chikanösen Streitigkeiten gemäßbraucht wurden."

39 For an overview over the discussion see HAFERKAMP (2013) §§ 765 et seqq., margin notes 99 et seqq.

40 See the contribution by Meccarelli in this volume.

or to genuine optimism regarding the role of codification is a question that might merit further comparative analysis.

But if Biagio Brugi's view is to be taken as representative of at least a strong current of Italian scholarship at the turn of the century, one has also to acknowledge marked differences in the appraisals of the extent to which a codification is open. Italian scholars seem to have been convinced that – as far as the social question is concerned – special law is the potential raw material of ordinary, regular codified law and that it serves as a temporary repository of a normative avant-garde which, once dogmatically refined and generally accepted in terms of its contents, will at some point or other make the passage to codification. The 'Italian' view is perhaps mirrored in Brugi's view that as a response to current social needs, special law need not comply with an existing private law codification in any systematic sense; in other words, it is the task of jurists to "understand old and new law as a System".⁴¹ In the last analysis, this is a hands-on approach which favours attention to current, pressing problems over technical questions of systematic purity. This approach seems to be less pronounced in the German context. In fact, von Gierke would have chosen to sidestep the legislative laboratory of socially imperative special laws and opted instead for codifying (some of) their values and regulations from the very start. At the other extreme, Planck would of course have flinched at the thought of legal material contained in special laws trickling into the BGB.

This leads – inevitably, given the scale of the task – to a blind spot in this panel: the role of jurisdiction and legal science in applying statute law, be it a code or a special law. Our paper has focused on *academic* debates over the relationship of *ius commune* and *ius singulare*, mainly in the course of the 19th century and with an especial eye to a future codification of private law. But Massimo Meccarelli has gone beyond that and, by referring to contemporary Italian writings, hinted at possible roles and tasks legal academics and the judiciary⁴² might take up when dealing with both codes and special law. By moving into the contemporary forensic arena, it might turn out that the difference between code and special law, between *ius commune* and *ius singulare*, is viewed as less pronounced, perhaps, even, of no importance at all,

41 See the contribution by Meccarelli in this volume.

42 Halpérin (see his contribution in this volume), too, points to the important role the process of *cassation* played in reinforcing the French (civil) legal system's claim to generality.

in day-to-day legal affairs. Such an observation might shift the focus of debate from the question “code or special law?” to “statute law or legal practice?”

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A French Perspective about the Limits of Equality in 19th–20th Centuries Law

French law after the 1789 revolution can be considered as an ideal type of ‘monism’. It retained a considerable legacy from the *Ancien Régime* concerning the political unification of the realm and the construction of a modern, relatively centralized state. However, the *Ancien Régime* had been based on a ‘corporate State’ which respected numerous privileges and a plurality of rules in the field of private law (customary laws, Roman law, canon law). The 1789 revolution dismantled this legal architecture and the French Assemblies built a new system based on the primacy of a unified statutory law. They were no more privileges and private law was secularized, the constitution of 1791 recognizing marriage as a purely civil contract. Between 1804 and 1810 the Napoleonic five codes achieved their scheme for a single law unifying civil, criminal and procedural matters. The law of March 21st 1804 introducing the *Code civil des Français* abrogated all rules of Roman law, customs or royal ordinances that were inconsistent with the Code. From the Napoleonic regime onwards, French law also developed the model of a very centralized and unified State, rejecting any idea of provincial or regional laws.

Later, the 1905 Law of Separation between churches (the already recognised Catholic, Protestant and Jewish faiths) and state suppressed any legal contact between the state and religions. In French *laïcité*, religious laws do not exist as binding norms within French territory. Since 1946, the French constitution has also adopted the monist model as far as relationships between domestic and international laws are concerned. The rules of treaties that the French Republic has ratified are automatically integrated in the French legal order and since 1975 case law has permitted French judges to set aside a French statutory law if deemed inconsistent with international law according to the so-called *contrôle de conventionnalité*. Since the 1958 constitution, the system of judicial review through the Constitutional Council has completely assimilated Kelsen’s hierarchy of norms within French case law and legal science.

However, the French legal system is not absolutely resistant to diversity. Since 1918, there has been a special local regime in Alsace-Moselle which maintains some German laws inside the territories that were annexed to the *Reich* between 1871 and 1918.¹ In French overseas territories, there are special configurations admitting derogatory laws: Wallis and Futuna has its own customary law, especially regarding land law; on the island of Mayotte in the Comoros archipelago, the observance of personal status based on Muslim law was replaced in 2010 by a local law based on the French civil code containing a fifth book with derogatory rules dating to 2002;² New Caledonia has its own citizenship for two groups of inhabitants, one of which is subject to a civil law inspired by French law, although it has not adopted new French statutes automatically since 2012, the other to customary laws (*kanak law*).³

Today, a great amount of French legal rules is codified (more than 62 % of statutory laws and administrative regulations) in 73 codes. The question arises of whether this diversity of codes poses a threat for an inclusive law, such as the five Napoleonic codes, and for a multiplicity of special regimes, for example, workers, consumers, writers and inventors, and foreigners. For this reason, the historical question of the relationship between codification, equality and the inclusion or exclusion of minorities is not so easy to resolve in French law and the schema proposed by Massimo Meccarelli⁴ can be used to consider four areas: 1) the historical roots of the principle of equality, 2) the development of special laws, 3) the unequal regimes of colonial law and Vichy law, and 4) the recent evolution with the anti-discrimination vs. discrimination debate.

1 The principle of equality, its historical roots and meaning in French law

The ‘passion’ for equality may be argued to have very ancient roots in France, especially in inheritance law: during the *Ancien Régime*, many customs in Western and Central France were based on strict equality between

1 WOEHLING/SANDER (2019).

2 BLANCHY/MOATTY (2012).

3 DEMMER/TRÉPIED (2017).

4 See his contribution in this volume.

children in the sharing of their parents' assets.⁵ However, the *Ancien Régime* was based on the division of society into three 'orders': two privileged ones (church and nobility) and the non-privileged Third Estate (*tiers-état*). Some peasants remained in a modern kind of serfdom. The Protestant and Jewish minorities were for a large part outlawed and their marriages went without recognition. The 1789 Revolution commenced with the transformation of the General Estates, in which each order had traditionally had one vote, into a National Constituent Assembly ignoring the division into orders. After the so-called "Night of the 4th of August", during which the National Constituent Assembly abolished all privileges, the Declaration of the Right of Man and Citizen was voted on the 26th of August 1789. This famous text, considered as a binding norm during the French Revolution, was clearly a manifesto against privileges. The political situation explains the peremptory character of articles 1 and 6: "men are born and remain free and equal in rights" (art. 1), "the law must be the same for all, whether protecting or punishing. All citizens, being equal in its eyes, shall be equally eligible for all offices, positions and public employments, according to their ability and without other distinction than that of their qualities and talents" (art. 6). The legal consequences of these articles were confirmed by successive legislation concerning religious minorities (law of 24th December, 1789 for Protestants, laws of 28th January, 1790 and 27th September, 1791 for Jews).

The 1804 Civil code reaffirmed this equality of rights among French people. Its article 8 said that every Frenchman would be endowed with civil rights. The Napoleonic Code is the first Code where God is absent and where there is no discrimination according to the religion of the spouses in marriage law, unlike the Prussian ALR and the Austrian ABGB. French law only recognised civil marriages. Religious marriages were removed from the law to a private sphere and it was forbidden to hold a religious marriage before the civil one. For the Protestant and the Jewish minorities, the French law of marriage was completely neutral, and therefore absolutely egalitarian: the door was open for those who wanted to make inter-religious marriages and even for the small minority who did not want any religious ceremony at all. Other parts of the civil codification were based on equality: the regime of ownership was unified after the suppression of all feudal duties, inheritance gave the same rights to male and female heirs, and it was forbidden to

5 TODD (1990) 56–57.

disinherit a child. In criminal law the principle of equality meant the same penalties for all offenders (the adoption of the *guillotine* brought to an end the aristocrats' privilege to be beheaded) according to the legality of all offences and penalties. Even if an imperial nobility was created in 1806–1808, the new nobles (like those former nobles whose titles were restored after 1814) enjoyed no privileges.

As Massimo Meccarelli has observed, the judges' respect of the principle of equality was guaranteed by the procedure of cassation and the 1790 institution of the Tribunal of Cassation, renamed Court of Cassation in 1804. Huge numbers of plaintiffs turned to the Court of Cassation, especially in criminal matters, and it had to deal with all petitions without distinguishing those that were important for case law and those that only required the routine control of the judgements. The Court of Cassation thus developed a binding case law, modelled on statutory laws with general rulings that were equally observed in the whole of France. This was an efficient means to break any attempts to establish regional case law.

Of course, it would be naïve to believe that there were no fissures in this principle of equality, as conceived first in the Declaration of Rights of Man and Citizen, then in the Napoleonic codification. In French colonies, as the 1789 Declaration ignored slavery, it continued until a law of 1794. Nor did it change anything in the statute of married women, despite the private initiative of Olympe de Gouges. When the Napoleonic Code was adopted, slavery had already been reintroduced in the colonies in 1802. In the Caribbean, once introduced the Civil Code coexisted with slavery until 1848. Even personal relationships (marriage, adoption, gifts) between white and coloured free persons were prohibited by regulations, thereby creating a civil regime of apartheid.⁶

The Napoleonic Code maintained the civil incapacity of married women, which had not been suppressed during the Revolution. According to the “marital power” (*puissance maritale*), married women needed special authorization in any act of civil life, for example, for contracting or suing. Civil and criminal rules concerning adultery were clearly treating husbands and wives unequally. Article 1124 lumped women together with other “unable persons”, like minors or lunatics. Widows' inheritance rights were extremely

6 NIORT (2002).

limited, being considered only as irregular heirs and coming behind all the husband's relatives. That said, it was the same for widowers, but generally speaking men had larger patrimonies than women. Not until 1938 was this marital power suppressed, while the property rights of married women were first reformed in 1942, full equality in the management of matrimonial assets was legislated in 1965 and 1985, and complete parity in parental authority over children in 1970 and 1997. Despite their civil capacity, not even unmarried women could be witness in civil acts until 1897.

The Napoleonic Code was also hard on foreigners and workers. Based on the nationality principle, until 1819 the rules of the Civil Code excluded foreigners from French successions (by the so-called *droit d'aubaine*), except where there was a special treaty with a foreign country. According to the 1810 Penal Code, foreign vagrants could be deported. The recognition of the civil rights of all foreigners living in France was ruled by the principle of reciprocity (art. 11 of the Civil Code). As for workmen and servants, there were only two relevant articles in the Napoleonic Code: article 1780 prohibiting perpetual commitments and article 1781, which gave primacy to the word of employers in case of wage conflict. This discriminatory article was not abolished until 1868. Napoleonic legislation prohibited all coalitions with unequal penalties for employers and employees: strikes were illegal in France until 1864 and trade unions could only be created legally after 1884.

One has to distinguish between these inequalities that were contained in the codification and some special laws of the Napoleonic period that were adopted later, such as the 1806–1808 decrees against Jewish creditors suspected of usury that remained in force until 1818, or the regime of *majorats*, which provided for inheritance in favour of the eldest son for certain assets of members of the nobility until 1849. The Napoleonic Code was a bourgeois code written for French husbands and fathers who were well-off and could pay the fees associated with civil proceedings. However, the inclusive character of the Code's general terms opened the rules to a process of democratization: every owner could be protected by article 544, every victim of a tort could sue the responsible party, who was liable according to article 1382. After a law of 1851 provided for legal aid, separation and later divorce (re-established in 1884 after its suppression in 1816) was available for relatively poor people.

2 Special legislation: against or in favour of equality?

Like other countries with codified or consolidated laws, during the 19th and 20th centuries France saw how the number of ‘special laws’ grew and how there were even some processes of de-codification in matters like company law. Did these special laws create diverse regimes characterized by new forms of inequality or did the legislator’s predilection for certain categories or persons issue in norms for an inclusive re-balancing of relationships between the powerful and the weak? In this section I will consider those two of the three cases studied by Massimo Meccarelli which concern social law and criminal law, before discussing a specific development in French administrative law. Colonial will be discussed in a section to itself.

In a sense, what we call ‘social law’ got off to an early start in France with the Napoleonic creation of *prud’hommes* councils in 1806 (the first for the silk industry in Lyon). These ‘industrial tribunals’ were conceived to settle the conflicts between silk merchants and shop stewards (*chefs d’atelier*) within the old structure of the textile industry. Not only was the composition of these tribunals unfair on workers (who were initially absent or present only in a very small proportion), but the goal was to control the proletariat to the advantage of the employers. However, the spread of these tribunals, whose composition became more equative after 1848, favoured the development of a case law that tried to regulate oral employment contracts, in regard, for example, of the customary delays in redundancy payment. Paradoxically, this concern for equity was questioned by the Court of Cassation in favour of the employers from the 1860s onwards.⁷

The cautious, slow development in France of “working legislation” (*législation ouvrière* as it was called until the end of the 19th century) was also a consequence of the idea to include workers as parties in genuine contractual bargaining. Despite the fact that most employment contracts remained oral and tacitly included working rules that enhanced employers’ disciplinary powers, statutory laws limiting working hours (first for children and women, later for all workers) and then recognizing the notion of abusive redundancy (law of 27th December, 1890) reduced asymmetries in employer-employee relations. At the start of the 20th century, Maxime Leroy defended

7 COTTEREAU (2006).

the idea of *droit ouvrier* based on customs,⁸ while some jurists called for the development of a social law to counterbalance the bourgeois character of the Civil Code. In 1910, France was the first country in the world to plan an Labour Code, which would come into existence decades later.

As for criminal law, in comparison with many other legal systems, it is not so easy to plot its evolution in France during the 19th and 20th centuries or to define the specific character of French law. French criminal law, as codified in the 1810 Penal Code (which superseded the first Penal Code of 1791) and in the 1808 Code of criminal procedure, was based on the principle of legality of offences and punishments. Three categories of penalties – contraventions, delicts and crimes – were judged by three different courts: police tribunals, tribunals of first instance and courts of assizes. To judge crimes, courts of assizes were constituted on the British model and consisting of three professional judges and twelve laymen acting as jurors. These general rules can be considered as inclusive and even based on the principle of equality since criminals were judged by their “peers”. However, as in civil matters, equality was restricted to male owners of property: jurors could only be men and were selected by prefects according to bourgeois criteria. At different times, some special procedures were in place which may be regarded as attacks on equality. Special criminal courts, without jurors and mixing military and civil judges, were set up to judge felons in the 1808 Code. These special courts, used as *Cours prévôtales* against political opponents between 1815 and 1818, were in operation until 1818 and finally suppressed in 1830. The Court of Peers (the French House of Lords during the constitutional monarchies from 1815 to 1848) judged crimes committed by peers (a privilege) and plots against the State (a means of political repression). After the 1851 *coup d'état* Louis-Napoléon Bonaparte used mixed commissions with prefects, military officers and general prosecutors to “judge”, albeit only on files, republican opponents. Political crimes, recognized as special categories of offences since 1830–1832, were subject to a special regime of detention. Military courts were also employed during the 1871 repression of the Paris Commune.

With the third Republic, special courts were suppressed except the *Haute Cour* composed of members of the Senate to try plots against the Republic

8 LEROY (1913).

and courts-martial for military cases, as in the Dreyfus *affaire*. France was part of the general movement associated with Italian criminology, the Liszt school and the Anglo-American experiments with juvenile courts to distinguish between first-time and habitual offenders through the “individualisation of punishments”. Despite their reluctance regarding the radical solutions of Lombroso or Garofalo, French jurists like Garraud or Saleilles supported the idea of giving judges more power to lessen or increase penalties according to the profile of the offender. The statutory outcomes were a very severe 1885 law against habitual “small offenders”, who were punished by “relegation” comparable to the transportation of criminals to penal colonies,⁹ and milder laws for first-time offenders, with suspended sentences in the 1891 law for “sursis” or minors (1912 law regarding special judges for juvenile offenders). In view of the sterilization procedures for habitual or drunk criminals approved in the United States, French law seems not to have been the most exclusive in this field. There was no general plan for a dualist criminal law which would exclude certain criminals from the common rules of the Code. But the 1893–1894 law against anarchists, branded by the left as infamous “evil laws”, created a new crime of conspiracy (*association de malfaiteurs*) that continues to be used today against terrorists and restricted extremist propaganda. Nonetheless, it was not generally used against socialists, unlike Bismarck’s similar laws.

Another idiosyncrasy of French law, from 1800 until today, is its dualism, the result of its encompassing two systems of justice, the traditional judiciary (called in French *justice judiciaire*) responsible for civil and criminal matters and the administrative judiciary (*justice administrative*) for matters concerning the relationships between administrators and citizens. Since 1800 the two branches of the judiciary have had their own supreme court, the Court of Cassation and the Council of State, respectively. Each of these supreme courts developed a very strong case law (*jurisprudence* in French), the Court of Cassation’s based on codified laws, the Council of State’s on uncoded laws and precedents. Private law appeared as “common law” (*droit commun*) and administrative law as derogatory law (*exorbitant du droit commun*). Administrative law corresponded to competences acquired by administrative courts over administrative acts (control of legality), administrative contracts

9 ALLINNE (2003) 205.

and liability (what were called “full contentious matters”). Like equity in English law, it was built as a complete branch of law, outside the codes, to protect administrators against the action of ordinary courts. On this view, it was unfair in its privileging of the administration. But it became less and less arbitrary (contrary to Dicey’s initial opinion),¹⁰ as administrative courts admitted more and more citizens’ petitions against administrative acts and acquired genuine independence vis-à-vis the Government, especially after a law of 1872 concerning the Council of State. The fact that citizens could obtain the annulment of general regulations in cases of illegality or obtain compensation for disregard of vested rights meant that administrative law could be also inclusive.

At the turn of the 20th century, the Council of State’s case law built on liberal and republican ideologies to blossom into two fields involving relationships between equality, inclusion and codification. The first dealt with the liability of public persons. Not only did the Council of State admit state liability (subsequently, of local administrators, too) for damages caused to citizens by public services, but the supreme administrative court (*Cames* case, 1895) recognized the strict liability of the state (there was no need to prove negligence on the part of the employer) for accidents at work in state manufactures. Three years later (*Teffaine* case in 1898), the Court of Cassation began to create its own case law about what was called “liability because of the things”, a highly original system of strict liability based on a bold interpretation of article 1384 of the Napoleonic Code. Both case laws may be said to have been inclusive in supporting workers or victims of accidents who required help to file for compensation.

The second field was supervision of the legality of administrative acts. In order to subject these acts to a single, unified regime, the Council of State began to declare that a principle of equality (in vague reference to the 1789 Declaration) before the law existed which had to be respected by local administrations. Of course, case law did not question the validity of special statutes, but that was the origin of the idea that similar situations had to be subjected to the same rules. Derogations to equality could be decided by parliament alone (in the absence of any constitutional judicial review until 1958), not by administrators.

10 CASSESE (2000).

3 Unequal regimes in French law: Colonial domination and Vichy discriminations

In two different contexts, the *longue durée* of the French colonial empire on the one hand, the five-years period (1940–1944) of the Vichy Regime on the other, French law was plainly unequal and exclusive. In both cases, neither the codified structure of the law nor the professional cultures of justice were any obstacle to the admission of these derogatory rules which should have been deemed inconsistent with ‘ordinary’ French law.

As far as colonial law is concerned, France is just one example (the most flagrant after the British empire) of a colonial domination that was intrinsically unfair on indigenous peoples. In no colonial empire did the annexation of overseas territories mean the integration of their populations under the common rules of the colonizers’ legal system. As the British Government did not see any contradiction between the rejection of authoritarian codification for British citizens and its deployment as a useful means of governing Indians or Africans peoples (through penal codes), so the French Government considered that the colonized became ‘French’ and were submitted to French laws but, except in some limited cases, did not enjoy the rights of French citizens. This distinction between French ‘subjects’ and French citizens, although not expressed in statutory rules, was the basis of French colonial law in its entirety. Without their consent, colonized subjects were submitted to the French laws that the colonizers decided to introduce in each colony on a case by case basis, especially in criminal matters, land or contract law; but they were not entitled to benefit from the equal rights of the Civil Code. They kept their personal status, based on Muslim or customary law, and did not obtain political rights, except for the inhabitants of four towns in Senegal and of the French settlements in India, who could elect their representatives in the French Parliament. The consequence of such a system was that an Algerian man who wanted to acquire political rights had to be ‘naturalized’, despite the fact he was already ‘French’, and to abandon his personal status until 1919, which meant that such naturalizations were very rare before 1919.

Sometimes the French colonial order got caught up in its own contradictions. The first Algerian subjects, indigenous Jews (French nationality was not extended to all Algerian Jews until 1870), saw their attempts to become barristers rejected by the colonial Bar but admitted by the French courts in

the 1860s, as the relevant law made no discrimination between different kinds of Frenchmen.

In each colonial territory, French laws were introduced by special decrees, which made a patchwork of rules that differed from one colony to another.¹¹ Inequality reached a peak with the rules of “*indigénat*”, for long known erroneously as the “*Code de l’indigénat*”. Beginning in Algeria with a temporary law of 1881, which would last for seven years, this was a derogatory regime giving administrators the power to inflict extraordinary penalties on disobedient natives: collective fines, collective seizures or restrictions to circulation, including administrative detention. This regime was extended by specific decrees to Cochinchine, Senegal and New Caledonia, then to West French Africa and East French Africa, the rest of Indochina, Madagascar, and even to the League of Nations mandates (Togo, Cameroon) during the interwar period.¹² In fact, there never was a *Code de l’indigénat*, a title invented by anti-colonialist activists, but it is clear that until the regime’s general abrogation in 1946, there was a deliberate policy that discriminated violently between colonizers and indigenous peoples and was inconsistent with the principle of separation between the administrative and the judicial authorities that was the rule in the metropole. If legal historians did not confuse this regime with all the arbitrary rules, or unlawful practices, of colonization, it is a cruel example of French jurists’ failure to react against so blatant a denial of the ‘principle’ of French law.

Despite the great differences between the two situations, there were various overlaps between Vichy legislation, especially its anti-Semitic law, and the discriminations of colonial law. In Algeria, the Vichy regime withdrew French nationality from the Jewish families that had acquired it in 1870 and went back to being considered colonial subjects without political rights and with their own laws, which were impossible to apply in practice. This reactionary measure, demanded by many colonists, combined with the introduction of the two ‘statuses’ of Jews (laws of October 1940 and June 1941) to create public law incapacities on racial lines, one being to have at least two un-baptised Jewish grand-parents. The two anti-Semitic acts overlapped but in some cases did not concern the same persons, because there were Jewish people in Algeria who had not descended from those naturalized in 1870. By

11 DURAND (2015).

12 MERLE/MUCKLE (2019).

the same token, the Vichy regime ‘denaturalized’ many Jews who had become French during the 1930s¹³ but did not deprive all French Jews of their nationality because anti-Semitic policy was based on the distinction between Jewish foreigners, who from October 1940 could be held under administrative arrest, and Jewish citizens, who were excluded from many professions.

Vichy legislation in its entirety – over 16,780 laws and decrees in four years – was anti-republican and contained many inequalities toward Jews (for one reason or another, more than 1,700 texts dealt with them), women (legislation on divorce and abortion), homosexual males (relationships between consenting minors and adults were punished for the first time in France under a 1942 law) and freemasons (excluded from public service). These laws were of course repressive, establishing special courts and implementing many derogations to ordinary criminal procedure. Most of the reforms were enacted by bespoke laws and not therefore integrated in the codes. A significant difference with respect to Germany and Italy was that Vichy anti-Semitic legislation did not prohibit marriages between Jews and Aryans and had no direct bearing on private law. Its racist focus was on excluding Jews from the civil service, with a few exceptions permitted by the otherwise stringent Council of State; from the liberal professions, where limited quotas were enforced for barristers or doctors; and from business activities, by means of “*aryanisation*” – the confiscation and administration of purportedly ‘Jewish’ assets as if they were the assets of bankrupts. All these exclusions debilitated Jewish people by depriving them of their means of support at a time when the French authorities and police force were backing the German policy of genocide, which they continued to do until 1942. Whereas the Civil Code did not deal with the Jews, many law professors introduced these public incapacities in their courses about the civil status of persons. Without protesting against these provisions, they felt that they amounted to an evident derogation of the principle of equality that had to be justified, as for criminals, by “public necessity”. Again, as for colonial law, there was no room in the so-called culture of codified law for any reaction that might consider these laws as ‘monstrous’.

Even after the 1942 Allied landing in North Africa, one part of the French authorities, led by General Giraud, was reluctant to abandon the anti-Semitic

13 ZALC (2016).

ic legislation. It was not until the ordinance of 9th August, 1944 “re-establishing the Republican legality” that it was decided to abrogate all “discriminations” based on “the quality of Jew”. This text was written by René Cassin, a Jewish law professor who had joined General de Gaulle in 1940, serving as Minister of Justice for the Free French. This was the first use in a French statute of the word ‘discrimination’, which has previously appeared in the 1919 Treaty of Versailles, in connection with the city of Danzig. The words “quality of Jew” were also a clear riposte to Vichy racism.

4 New trends, new risks?

The vocabulary of discrimination and diversity was little used in France until the 1970s. While the idea of fighting against discrimination was present in employment legislation prohibiting employers to differentiate between members and non-members of trade unions (a 1956 law laid down penal sanctions), the word discrimination was not employed. The first step was the anti-racist law of 1st July, 1972, which established the new offences of racial defamation by the press, refusal to contract on grounds of race, and dismissal on grounds of race. These provisions were inserted in the old Penal Code, then developed in the new 1992–1994 Penal Code’s special section on discriminations. In line with European legislation, since 2001 various laws have prohibited discrimination on eighteen grounds on the principle of recognition of diversity in respect of sexual orientation, health, physical appearance or age. A special authority (called HALDE) was set up in 2004 and then integrated in the *Défenseur des droits*, created by a constitutional amendment in 2008. French law is in line with European standards regarding illegal discriminations and many of these prohibitive rules have been introduced into the French penal, labour and health codes.

As for affirmative action, French law is more reluctant to identify minorities: it is, for example, forbidden to include details of race or origin in the census or to grant them privileged rights or quotas, while in 2015, the French Senate archived ratification of the European charter for regional or minority languages. In fact, there are many rules in favour of disabled persons or inhabitants of depressed areas, especially in matters of education. In some cases, such as the notorious student-selection scheme at Sciences-Po Paris, a special law has condoned the institution’s practice of recruiting a quota of students from the suburbs, who are presumed to belong to lower

classes.¹⁴ The structure of codified law is irrelevant to the development, or otherwise, of policies like these which respond to a new conception of ‘equal opportunities’. The 1992 Consumer Code is inclusive in encompassing the whole population. The 2004 Code regulating the entry and permanence of foreigners is exclusive because it contains restrictions on circulation and provisions for deportation that are not applicable to French citizens. The 2002 Code of internal security risks becoming increasingly exclusive as it incorporates measures taken in 2015–2017, when emergency powers were enacted against terrorism and violent protesters. The use of general clauses in the French codes tends towards an inclusive law and some lack of recognition for diversity. It has been reinforced by the constitutional status of the principle of equality as guaranteed by judicial review. However, French legal history shows that neither a long tradition of equality nor professional cultures of codification are obstacles to exclusive provisions approved in parliament.

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14 FASSIN/HALPÉRIN (2009), 30.

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Diversity, Codification and Political Representation: Comments from the Brazilian Perspective

1 Preliminary remarks

A historical inquiry into diversity as a form of ordering tensions between equality and inequality in law should probably start by establishing some preliminary definitions. Laying the groundwork here is important because equality – and, as a result, diversity in dealing with it from the normative point of view of the legal system – is a highly controversial concept. Given the significant variety of legal, social, political, moral and economic usages of the word over time and in different places, it is helpful, if not essential, to begin with a clear analytical framework in mind. Moreover, to enable productive comparisons between legal systems in Europe and the Americas, it is important to devise this framework with relative openness regarding the distinctive forms that references to equality might assume under different historical circumstances. It would be simply misleading to assume that coincidence in the use of a given term in France and, say, Brazil or Argentina during the same period implies coincidence also of the social mentality or, for that matter, of the institutional consequences of a given conception of equality. This might sound trivial in theory but is not always easy to observe in scholarly practice on either side of the Atlantic. Difficulties arise not only as far as historical differences between Europe and the Americas are concerned, but also concerning the factors driving historical change and the diffusion of intellectual trends. When investigating major legal history topics of global repercussion such as codification and equality/inequality, provincializing Europe is as much a methodological challenge as it is an important tool for neutralizing cultural bias.

Understood in terms of arguments about the design and implementation of a social ideal, discussions about equality tend to revolve around basically four types of issues: (i) the notion of equality, or *equality as what?*; (ii) the principles of equality, or *equality for what purpose?*; (iii) the measure of equality, or *equality of what?*; (iv) the extension of equality, or *equality among*

*whom?*¹ At the risk of oversimplifying a very complex problem into an abstract scheme, I would argue that any historical conception of equality has addressed these four questions in one way or another. To be sure, answers have varied extensively in both theory and practice of law since antiquity. One needs only to review the literature on the subject to trace the basic categories and positions back to ancient Greece or Rome. However, as Meccarelli points out, there is a decisive shift in the history of equality that separates the ancient, medieval and early modern usages of the word from the specifically modern or contemporary reference to equality as a social ideal with consequences for different normative, methodological and institutional aspects of the legal system. This shift goes back to the late 18th century.

Understood as a “programmatically value” (Meccarelli) for ordering and differentiating within society through law, equality emerged as a central demand of the revolutionary period in France and the United States, before adapting later to the transformations introduced by industrialization and mass culture in the 19th and 20th centuries. Equality as a normative claim is, therefore, a specifically modern proposition. Its terms might well relate to reflection on natural law and natural rights in the 16th and 17th centuries. However, its normative and institutional implications such as, for example, constitutionalism and private law codification belong to the world of post-revolutionary Europe and the newly independent Americas.

But even if we confine our discussion to the last 250 years, questions arise as to how to account for historical change. Meccarelli has chosen to focus on the “dialectical relation” between diversity and legal protection, an approach for which he offers two reasons. First, from a sociological perspective, there is a tension between law and society, between the society presupposed by the civil code and the actual, living society whose diversity exceeds the rigidity of codified law. As a result, social change brought about by the technical transformations of industrialization, as seen for example in labour law, has to be dealt with outside the scope of the civil code by means of special legislation. Second, from the perspective of legal methodology, tensions also arise due to the fact that 19th-century legal thought deliberately suppressed diversity as part of a strategy to unify the law through state-sponsored codification and adjudication based on abstract concepts and formal syllogism. Here, tensions

1 For discussion of the issues involved, see SEN (1992) 12 ff.

between formal equality and *de facto* inequality were solved by fundamental changes in early 20th-century legal thought concerning legal principles and methods applied to the social question. Finally, Meccarelli exemplifies his approach by explaining three different functions taken up by special legislation to deal with diversity without resulting in the breakup of the system's logic: integration (labour law), exclusion (criminal law applied to political dissidents) and non-assimilation (colonial law).

In what follows, I discuss briefly the merits of this approach as well as the analytical gains it offers to the study of Brazilian legal history. The paper begins by drawing attention to the methodological challenges involved in thinking about diversity as a form of dealing with equality/inequality in law, focusing especially on the fact that much of today's diversity thinking – including, if I read him correctly, that of Meccarelli – has been influenced by the sociological critique of legal formalism diffused around the globe in the early 20th century. The paper then moves on to a brief discussion of the Brazilian case. Here, it first attempts to show how the relation between codification and special legislation has been complicated from the start by the troubled history of the Brazilian civil code. It then focuses on the relation between special law and political representation in the 1930s and 40s, pointing to the institutional implications of sectoral legislation in a corporatist regime.

2 Regarding method

Regarding method, apart from the introductory comments made above, the main topic worth discussing has to do with the difficulties of separating the analytical framework used for studying diversity and the actual historical responses to tensions between equality and inequality in law. Specifically, when looking into the history of codification and special legislation as forms of dealing with diversity in law and legal thought, one risks being intellectually hamstrung by the sociological critique of codification and legal formalism that circulated the world in the early 20th century and still informs much legal theory discussion today. In my opinion, the risk here is to mistake considerations and value judgments offered by authors directly involved in the transformations of private and public law around 1900 and later in the 1920s and 30s for a general framework of thinking about diversity that is still acceptable today. If this is the case, the study of the strategies dealing with tensions between equality and inequality in law ceases to be oriented by

overarching questions that can be answered through historical research and is instead identified with the very developments it attempts to explain. In other words, the analytical framework for discussing diversity is directly derived from the object it attempts to understand. Accordingly, instead of producing new and innovative insights into modern and contemporary legal history, the study of different historical forms of dealing with diversity in law risks simply updating a well-known, historically situated critique arisen in 19th-century legal thought.

One possible way to avoid this risk would be to work on preliminary definitions of the three central concepts: diversity, equality and inequality from the point of view of legal history. Much like equality, and probably merely the other side of the same coin, diversity is a relational concept whose core meaning must be rendered more precise to be useful for historical research. Diversity of what? In relation to what or to whom? And to what extent? The answers to these questions are not trivial. They depend on historical context, especially if the analysis focuses, as Meccarelli's does, on the relationship between diversity and legal protection.

As far as this conceptual aspect of the discussion is concerned, Meccarelli has chosen not to offer an exact definition of diversity, preferring instead to elucidate different historical conceptions by contrasting medieval, early modern and contemporary views. Central to this approach is the construction of monist legal thought in the 19th century, followed by its crisis in the early 20th century. According to this view, 19th-century jurisprudence was state-centred, abstract, founded on an exclusive view of the system that reduced the law to positive legislation and judicial interpretation to formal syllogism. To overcome the limitations of this type of legal thought in the light of the technical and social transformations that came about at the turn of the century, open-minded lawyers had to adapt the legal system to a changing reality by referring to the "reality that exceeds the civil code", most notably in matters of labour and union law.

One possible objection to this approach is that it is formulated in the same terms as the sociological critique of 19th-century legal thought that it describes as a turning point in the history of thinking about diversity in law. The critique of legal formalism, of logical syllogism in adjudication theory, of state-centrism and positivism concerning the sources of law are all well-known topoi of late nineteenth and early 20th-century sociological jurisprudence. They are central features of historically situated legal theories arguing

for a society that exceeds the internal structure of codification. However, as recent studies have shown, e.g. concerning the Historical School in Germany² or the *École de l'Exégèse* in France,³ there are several problems with this well-established narrative, problems that cannot be examined here but that have mostly to do with the biased interpretation it offers of 19th-century legal thought. The point is not only one of historical accuracy but also, and mainly, of method, in the sense that the framework used to think about diversity seems to be directly derived from the historical experience it is supposed to analyse and explain.

3 Codification and social law in republican Brazil

Turning now to diversity as a form of dealing with tensions between equality and inequality in Brazil, the first thing to notice about the analytical gains of the approach advanced by Meccarelli is the specific context in which civil law codification was here discussed and implemented. Unlike many of its neighbours, Brazil is a latecomer to the reality of ordering social life through a single normative structure such as the civil code. Whereas other countries in the region were able to codify the relevant legal aspects of civil life in the 19th century, beginning with Peru in 1852, Chile in 1855, Argentina in 1869 and Colombia in 1887, Brazilian political institutions seemed incapable of producing a civil code until 1916. To be sure, just as in other parts of the world influenced by European legal thought, codification had been an issue in Brazilian legal culture and politics since the 1850s, when the then monarchic government took first steps towards drafting a civil code that would cement the country's independence from Portugal in civil law too.⁴ Yet successive attempts failed to deliver the code even after the fall of the monarchy in 1889, suggesting that slavery was a crucial, but not the only, obstacle to civil law reform in the Brazilian empire. It was only in 1899, after roughly ten years of republican anarchy and civil war, that the political system was stabilized sufficiently for the civil code to become a viable political project. After 18 years of political struggle, exhausting discussions and substantial

2 HAFERKAMP (2018).

3 HALPÉRIN (2014).

4 For the codification efforts in the 1850s, see REIS (2015).

modifications to the original text in both houses of Congress, the civil code finally came into force in the midst of World War I in January 1917.

On Meccarelli's account, the main consequence of this particular path to civil law codification is the fact that, in Brazil, legal doctrine and judicial practice had to come to terms with the civil code at a time when the code's power to order society through a single systematic normative structure had fallen into disrepute. Whereas in most of Europe and many South American countries codification is largely a product of 19th-century legal thought, in Brazil the enactment of the code coincides with root and branch transformations in state power, society itself and legal thought. The exception here is, of course, Germany's BGB from 1900. However, unlike Germany, the Brazilian civil code was not supported by a century-old tradition of modernizing law through legal science that could both substantiate its implementation and lay the grounds for its critique from a sociological point of view. In Brazil, until the 1930s there was no clear distinction between the scholars, lawyers, and judges acting in support of the code and the rise of sociological jurisprudence.

A good example of this can be found in Clóvis Beviláqua, the author of the draft civil code of 1899 which, after substantial changes in congress, came into force in 1917. A prominent advocate of evolutionist theories of law, Beviláqua was among the first in Brazil to discuss the work of Enrico Cimbali and Pietro Cogliolo, two of the prominent Italian jurists that Meccarelli associates with the growing attention among legal scholars for *de facto* inequality and other socially relevant aspects of private law. In his introduction to the Brazilian translation of Cimbali's *The New Phase of Civil Law* published in 1900, Beviláqua, who was also a feminist, emphasized the author's "genuinely naturalist" conception of law, asserting that, "in the future, jurisprudence will recognise in it one of its most powerful driving forces".⁵ A similar mindset can be found in Eduardo Espínola, the translator of Cogliolo's *Philosophy of Private Law*.⁶ One of the most prominent lawyers of the time, Espínola served at the Brazilian Supreme Court from 1931 to 1945, where, as chief justice, he was responsible for deciding on important, socially and economically sensitive issues of the time such as the admission of the *clausula rebus sic stantibus* in Brazilian private law.

5 CIMBALI (1900) 12.

6 COGLIOLO (1898).

At the level of legal doctrine and in some cases also of judicial practice, there is no incompatibility between the Brazilian civil code and the growing awareness of the social pre-conditions and functions of law. As far as diversity is concerned, the reaction against some of what we would today call the progressive dispositions of the draft civil code came from reactionary members of the Brazilian congress, some of them supporters of the monarchy, who opposed, for instance, the more egalitarian treatment of women and even the separation of church and state. Issues relating to the rights of women, to the substance of marriage or the legal status of the Catholic Church are some of the most intensely debated subjects in the eight-volume collection of congressional debates on the civil code. In contrast, little or almost no attention was given to economically sensitive issues such as the social function of property or contracts, the main focus of Cimbali's new civil law, for example. This is because, again unlike Germany or other European countries, the Brazilian civil code was debated in extremely adverse economic circumstances, during a period of severe economic recession and social unrest. Diversity was, therefore, reduced here to its moral implications.⁷

4 Special legislation and political representation in Brazil under Vargas

Developments in countries on both sides of the Atlantic suggest that the relation between codification and special legislation acquired a new nuance from the 1920s and 30s onwards. This is largely because subject matters of special legislation came to attain constitutional relevance, thus making socially sensitive issues, such as the regulation of labour and capital, politically significant in the sense that they provide an alternative form of political representation. Change in this regard relates first to the changing nature of state power during the first half of the 20th century. As Meccarelli points out in connection with the work of Filippo Vassalli and other Italian jurists whose books also circulated in Brazil, this process began with wartime legislation during the First World War and was destined to have an enduring impact on the functions later attributed to special law.

⁷ I have tried to examine the arguments and offer an overview of the debates on the civil code in REIS (2017).

It should be stressed, however, that this transformation was not limited to countries which would later witness the emergence of dictatorial regimes, such as Italy in 1925 and Brazil in 1930. Unlikely though it may seem, in 1918 Léon Blum, for instance, drew from his wartime experience the conclusion that in every democracy,

“il faut un chef de gouvernement comme il faut un chef d’industrie. La mission, la tâche nécessaire de ce chef est d’ordonner l’ensemble de l’activité gouvernementale, ou, en termes plus précis, d’adapter l’administration à une politique, ce qui implique la direction effective du travail politique comme du travail administratif”⁸

In both Europe and the Americas during the First and the Second World Wars and throughout the 20th century, this “administrative work” would largely be executed through special legislation, thereby paving the way for the debates on “decodification” in the late 1970s.⁹

From the Brazilian perspective, however, the central shift in the relation between codification and special legislation has to do with the connection between economic regulation (labour and capital) and the emergence of new forms of political representation. Even though state concern for labour and union law, for example, can be traced back to the beginnings of the Brazilian Republic around 1900, it was only after the revolution that brought Vargas to power in 1930 that the state began to regulate labor as a way to create corporatist forms of political representation. Regarded as the modern alternative in comparison to the old-fashioned liberal 1891 constitution, this shift towards corporatism was directly connected to the institutional crisis that arose after the operational model established *de facto* in 1900 by an informal agreement between regional oligarchs collapsed in the 1920s. During the 1930s and 40s, a majority of intellectuals and politicians came to a consensus according to which Brazilian society was deemed incompatible with representative liberal democracy. Instead of trying artificially to replicate Anglo-Saxon patterns of representation founded on individual liberty and party politics, intellectuals such as Oliveira Vianna argued that representation should be organized according to corporatist criteria. Defending the labour union reform of 1939, Vianna stated that:

“we should not react against institutions of professional or corporatist solidarity, but rather take them into our hands, face them with courage and change them, deform

8 BLUM (1936) 15.

9 See, most notably, IRTI (1999).

them, Brazilianise them to adjust them to our body, our conformation, the dimensions of our possibilities”.¹⁰

From the 1930s onwards, what used to be the field of special law became the source for alternative modes of political representation. This marked a watershed not only in constitutional law but also in the relation between the civil code and special legislation. As Meccarelli has shown, this relation might still be described in legal scholarship in terms of the centuries-old differentiation between *ius commune* and *ius singulare*. In practice, however, the decisive factor, in my opinion, lay in the creation of a distinct institutional framework, informed by a separate set of rules affecting both substantive and procedural aspects of the respective legal field – an institutional framework whose existence was justified by the fact that it represented directly, i. e. without parliamentary mediation, a group of professional, economic or social interests.

Again, labour law offers one of the clearest examples. Defending the constitutional competence of labour appeal courts to rule over collective bargaining agreements, Oliveira Vianna argued that

“there is no correlation between [the courts’] normative competence and the corporatist regime. The foundation of the normative competence of labour courts is not the political regime of a given country, but rather the nature of the decision itself, the peculiarity of the conflict to be judged, the structure of contemporary economic organizations. The foundation of normativity is organic – not political.”¹¹

In a society marked by its natural incapacity to exercise self-government, the purpose of the labour courts, according to Vianna, was to produce solidarity through the institutional framework of the state. Diversity, in this case, ceased to be a strategy of dealing with equality/inequality within society to become part of a state project that incorporated social conflicts and, at the same time, wanted to transform them productively to explore its political potential.

5 Final remarks

As long as it remains attached to value judgments and historical assessments forged during the social, political and economic turmoil of the early 20th century, comparative historical research on diversity as a means of dealing with equality and inequality in law is likely to produce little to no analytical gains.

10 VIANNA (1943) XII.

11 VIANNA (1938) 94.

In this respect, legal history and legal science in general still have much to learn from concurrent accounts of inequality in political science and economics.¹²

Bearing this in mind, and from the perspective of Brazilian legal history, this brief commentary stresses two basic points concerning Meccarelli's account. First, if the emphasis falls on diversity in private law in general and in the civil code in particular, attention must be paid also to contemporary developments in the modes of political representation. In Brazil, and presumably also in Italy, this means analysing private law transformations in the broader context of the crisis of parliamentary democracy and the rise of corporatism. Second, a comparative legal history of diversity should consider, as Meccarelli partly does, the specific local context in which diversity emerges as a challenge to law and legal science in the early 20th century.

As indicated in the comments above, at least in the case of Brazil there is hardly a clear-cut division between a formalist, civil code-centred jurisprudence on one side and social, progressive legal thinking on the other. Here as elsewhere, ideas and concepts are mobilized in response both to international trends and to specific local challenges, which is why research on diversity in law should not only consider, as stated above, the range of questions that the concept implies, but also the diversity of answers revealed by comparative work.

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12 For an influential economic account that relies heavily on legal documentation, see PIKETTY (2014).

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Section III

Autonomy

German Discourses on Autonomy from the Beginning of the 19th Century Until Today

What does diversity have to do with autonomy? First of all, autonomy is a mode of the “decentralized production of law”,¹ i.e. it generates diversity within the legal system. Second, autonomy refers to social diversity; it marks social differences in a normative way. In order to determine the significance of autonomy and its significance for diversity within the legal system, however, one must first realize that the law can deal with social differences in a variety of ways. In modern legal systems, it is primarily the state legislature that anchors social differences in law. This can take the form of special legal orders that provide for particular constellations of rights and obligations for certain functionally defined groups, e.g. for military personnel, civil servants, workers, merchants, craftsmen, etc.,² or by granting special rights to certain ethnic groups.³ Social boundaries can, however, also be marked in legal normative terms by the legal determination of disadvantages which are eliminated or at least mitigated by the law. This turns social differences into legal differences. Examples include: male/female, young/old, disabled/non-disabled.

Bearers of autonomy rights also operate within a special legal order. Yet, they are difficult to integrate into the scheme described above, in which the persons concerned are *objects* of a legal distinction and its legal consequences. In the case of autonomy, in contrast, those affected are *active subjects*. The groups themselves, that is, the concerned parties, develop their own character in a normative way. In modern Western states, this creates a tension with

1 BACHMANN (2006) 182.

2 In Germany: *Soldatengesetz* (Law on Soldiers); *Beamtenstatusgesetz* (Law on the Status of Civil Servants) and *Beamtengesetze des Bundes und der Länder* (Law on Civil Servants of the Bund and the Laender); *Handelsgesetzbuch* (Commercial Code); *Handwerksordnung* (Crafts Code).

3 In Germany, for example: *Gesetz über die Ausgestaltung der Rechte der Sorben/Wenden im Land Brandenburg* (Law on the Development of the Rights of the Sorbs/Wends in the Federal State Brandenburg).

the state's legislative monopoly. This tension explains the special character of the legal discourses on autonomy in Germany. Another peculiarity of the German debate is that autonomy as a legal concept was only rarely used when the rights and competences of bigger territorial units, such as provinces and the individual German states,⁴ were under discussion. Hence, there are also striking differences with respect to the debate about autonomy in other countries.

1 Autonomy as a legal concept

1.1 Demarcations

First of all, autonomy is not a specific legal concept. The term is equally at home in the language of politics, economics, art or morality. But even if it is used as a legal concept, different dimensions of meaning can be distinguished. A distinction must be made between a descriptive, a programmatic and a legal-normative use.⁵ Used descriptively, autonomy functions as a collective term for various forms of legally guaranteed spheres of freedom and independence. In this context, reference is made to legal phenomena, but no legal consequences are associated with the use of the term. Here, it is also possible to use it as a key jurisprudential term that bundles together certain legal phenomena, emphasizes common characteristics, and is a significant influence in current law and/or its future development.⁶ As a programmatic concept, the concept of autonomy has a legal-political function. By demanding more autonomy, one refers to a possible future state; it is a use of the term *de lege ferenda*.

Used in a legal normative sense, the concept of autonomy is applied in order to assert certain legal consequences. This can be done in different ways. On the one hand, a competence can be asserted: Anyone who says that a certain legal subject is a bearer of autonomy is claiming that this legal subject is entitled to certain rights. On the other hand, it can be an assignment of characteristics with legal relevance: Anyone who says that autonomy is a

4 An important exception is Paul Laband, who regarded only the individual German states as bearers of autonomy; for his conception see KREMER (2012) 22 ff.

5 Also in the sense of differentiation, albeit in a slightly different way (autonomy as a guiding principle, ordering mechanism or dogmatic figure): BUMKE (2017) 8.

6 BUMKE/RÖTHEL (2017).

source of law (*Rechtsquelle*) is claiming that the relevant norms have the quality of law. While both uses were often linked to one another, they were not completely congruent. Autonomy as a source of law referred to law-making, whereas autonomy claimed as a competence could also mean the competence to apply the law.⁷

The German debate on autonomy as a legal term as it developed in the 19th century, however, was primarily concerned with the autonomy of law-making.⁸ Initially, it was necessary to establish the position of autonomy in relation to private autonomy – this sharp distinction between “autonomy” and “private autonomy” also marks a difference to the contributions of Agustín Casagrande and Michele Pifferi. The differentiation was made on the basis not of the criterion of bearer, where private autonomy is granted to individuals and autonomy to collective actors (any such differentiation would break down because private autonomy can also be exercised in collective form), but of the rights associated with it: Private autonomy was to be equated with the authority to self-determine the application of law, autonomy was tantamount to self-determined law-making. Even though it still took well into the 20th century for a fixed conception of private autonomy to emerge,⁹ the distinction itself had finally prevailed by the end of the 19th century.¹⁰

But there is still another understanding of autonomy that needs to be distinguished, namely, autonomy as a means of regulating ethnic and religious diversity,¹¹ i. e. as a basis of competence for the self-administration of certain ethnic groups within a state characterized by ethnic and religious differences. Though not in Germany itself, this understanding of autonomy was nevertheless to be found in German-speaking countries, that is, in the multi-ethnic and multi-religious Habsburg Empire. In this context, the concept of autonomy was also used as a legal concept.¹² From an ethnic point of view, Germany differed from the Habsburg Empire in being largely homo-

7 More detail on this, COLLIN (2014).

8 Another use of “autonomy”, as found in the work of Lorenz von Stein, will be discussed later.

9 BACHMANN (2006) 182 f.

10 MEDER (2009) 80 f.; for details on this debate: HOFER (2011).

11 On this issue – albeit, in relation to individual, non-group autonomy – FOBLETS (2017).

12 STOURZH (1985) 105 ff.; in a contemporary perspective see, for example, SCHWICKER (1870); ANONYMUS (1902).

geneous. Although some ethnic minorities (above all Danes, Sorbs, Poles) also lived in the territory of Germany, they only settled in relatively small areas or were part of a mixed population within one area. Whenever special rights were debated in those cases,¹³ the term autonomy was not employed as a legal term. As far as religious differences were concerned, the individual German states were by and large religiously homogeneous (apart from the differences between the Christian denominations in larger German countries such as Prussia). This means that the problem of religious diversity did not arise there in the same way as it did in the Habsburg Empire.¹⁴ Moreover, the autonomy of the churches¹⁵ did not refer to the regulation of religious diversity within a state, but rather to the relationship of the church to the state.¹⁶ Two religious groups, namely the Jews and the Huguenots, the descendants of those French Calvinists who had found refuge in Germany, were an exception. They had been granted numerous privileges, and these are occasionally treated in today's research literature under the heading of autonomy.¹⁷ However, these privileges were abolished at the beginning of the 19th century and – to the best of our knowledge – were not discussed by contemporary jurisprudence under the concept of autonomy.

1.2 Range of variation of autonomy as a legal concept

Although the term “autonomy” had already established itself in law in the early modern period, it had not yet become a legal concept with firm contours. What emerges is an inconsistent and rather unspecific use of terms.¹⁸ The term first secured an established place in jurisprudential debate – in the sense of a legal concept related to a certain social group – at the end of the 18th century in connection with the autonomy of the high nobility.¹⁹ However, autonomy did not denote the legislative power of the high nobility over

13 For example ELLE (2010).

14 In the 16th century, the term autonomy in the sense of “freedom of belief” (*Glaubensfreiheit*) had been used in connection with confessional disputes, but this use of the term had been abandoned in the course of the early modern period, SCHWEMMER (2005) 319.

15 PEIZER (1834) 726 f.

16 HARDTWIG (1997) 376 f.

17 For example, ASCHE (2010); BATTENBERG (2010).

18 REISS (1902) 5 ff.; HAUG (1961) 4 ff.

19 SCHÄFER (2008) 648.

its subjects – this resulted from territorial sovereign rights²⁰ – but rather its authority to fix its own law internally, i.e. within the context of the family. This impinged on both questions of public law (e.g. succession to the throne, regency, title) and matters of private law, essentially, family law and inheritance law. The generally applicable – mostly Roman – family and inheritance law did not meet the requirements for the stable maintenance of the ruling dynasty and because of the necessity of the participation of the Estates, these family issues could not be entrusted to the ‘normal’ legislature.

Rather, it was assumed – even if controversial – that a special tradition of German law was decisive in the regulation of these matters.²¹ Even if such rationales changed in many respects over the course of the 19th century, as they adapted to the altered constitutional framework conditions²² and were disputed by influential jurists²³ – the “autonomy of the high nobility” (*Autonomie des Hochadels*) created a type exhibiting essential characteristics that were also deemed crucial for forms of autonomy in different spheres. At the same time, however, lines of tension became visible that were to shape the debate about the concept of autonomy in the period that followed:

- Was autonomy a private law or a public law legal institution?
- Did autonomy embody an original or derivative competence?
- Did autonomy only confer leeway within the dispositive state law or could it derogate state law?
- Were norms that arose on the basis of autonomy only binding on those directly involved in the act of norm-setting or were they also binding on other persons?
- Which groups were entitled to autonomy?

In general, it can be said that the debate enjoyed its heyday in the 19th century. The concept of autonomy was a fixture in legal encyclopaedias²⁴ and in the chapters on “sources of law” in legal textbooks.²⁵ This already points to a certain thematic perspective: autonomy was treated primarily as a source of

20 STOLLEIS (2012) 170 ff.

21 MIZIA (1995) 149 ff.

22 In detail GOTTWALD (2009).

23 GERBER (1854) 51 ff.; for a brief overview on the disputed points, OERTMANN (1905) 5 ff.

24 For example WILDA (1839); PFIZER (1834); BRUNNER (1875).

25 See on this KREMER (2012) 9 ff.

law (alongside other sources of law such as legislation and custom). Within the jurisprudential subdisciplines or directions, the attention paid to autonomy was distributed differently. It had a prominent place – because of the origin attributed to it in German law²⁶ – in the discipline of German private law (*juristische Germanistik*). It also attracted attention in the branch focusing on Roman private law (*juristische Romanistik*), although there it was treated with greater scepticism. It found its way too into the scholarship of public law, but it is striking that it met with considerable resistance among the most important public law scholars of the time: Gerber completely rejected the use of the term.²⁷ As he had already made very clear in his previous treatises on private law,²⁸ he did not classify such acts as a form of law-making, but rather as the application of law. Laband accepted the use of this term only within a very narrow scope of application.²⁹ Administrative law also included autonomy in its doctrine of legal sources, although in some cases with a clearly etatist emphasis;³⁰ however, here, too, opinion was not uniform.³¹

The question as to which legal subjects could be considered bearers of autonomy also gave rise to a broad spectrum of opinions, which entails taking into account different assumptions regarding the prerequisites and scope of autonomy. On a narrow view, it could be argued that only the houses of the high nobility (in the form of their house laws [*Hausgesetze*]) as well as the cities of Wismar and Rostock, which enjoyed a privileged status based on older rights, were able to produce law that derogated from state laws and was free of state confirmation.³² Beyond that, opinions were divided over the extent to which municipalities, non-municipal corporations or even private associations could be holders of autonomy; in some cases, the concept of autonomy was even mobilized in order to grant railway companies the right to produce law-equivalent rules³³ so that they could lay down more favourable liability conditions that deviated from state law.³⁴

26 See only PUCHTA (1828) 159.

27 GERBER (1865) 56 fn. 3, 137 fn. 1; see also KREMER (2008) 177 f.

28 GERBER (1854).

29 See in detail II. 2.

30 See in detail II. 2.

31 KREMER (2012) 27 f.

32 For a summary of the probably prevailing opinion, REISS (1902) 8 ff. with further references.

33 See, for example, GOLDSCHMIDT (1860) 362.

34 POHLHAUSEN (1978) 66 ff.

Finally, there was an equally broad spectrum of opinions on the issue of the extent to which autonomy required state intervention – in other words, whether autonomy was an original or a derivative power, i.e. a power derived from state authorization. There were various possibilities here: autonomy that did not require any state involvement at all; autonomy that required state recognition but only with a declaratory effect; autonomy that required constitutive state recognition; autonomy that was granted by the state. Grosso modo, a liberal view tended towards a rather minimal share of state participation, while an etatist view favoured greater state dependence. In the 20th century, this dispute was of little consequence, the prevailing view being that only autonomy granted by the state was legitimate.³⁵

However, this description only provides a rough overview, which does not yet sufficiently show the importance attached to autonomy in the legal system and the theoretical and conceptual ideas behind it. This will be explained in what remains of this chapter as it concentrates on a selection of threads in the debate and thematic emphases which give particularly clear expression to the political and legal normative dimensions of autonomy.

2 Debates and perspectives

2.1 Autonomy and cooperative theory (*Genossenschaftstheorie*)

The debate about the legal institution of autonomy was initially focused on the discipline of German private law, i.e. in that branch of scholarship that dealt with legal institutions that had not arisen from Roman law, but were assigned to a specific tradition of German law. This did not mean that Roman law jurisprudence (*juristische Romanistik*) ignored this topic.³⁶ Nevertheless, Germanic jurisprudence was able to combine the discussion about autonomy with a specific approach that allowed autonomy to be established as a central legal institution. The starting point was the cooperative concept provided by legal *Germanistik*. This will be illustrated by the considerations

35 MEDER (2009) 83 f. However, especially in the 1950s, authors who called for a state-free autonomy had their say, to a large extent as an expression of the so-called renaissance of natural law (*Naturrechtsrenaissance*); but it remained only a passing episode.

36 On the contributions of Roman law jurisprudence MEDER (2009) 73 ff.; KREMER (2012) 9 ff.

offered by Georg Beseler, Otto Bähr and Otto von Gierke, all of whom had a decisive influence on the development of the cooperative concept.

Georg Beseler is the authoritative founding figure of cooperative law (*Genossenschaftsrecht*). Drawing on his work, this section first outlines certain basic principles of the cooperative concept that will be key to understanding of the following explanations. For Beseler, cooperatives are a subset of the corporation, an association of several persons for the long-term pursuit of certain aims.³⁷ A corporation defines itself either territorially, in which case it is a municipality, or not in terms of a territory, in which case it is a cooperative. Such cooperatives include:

- federations of states, like the *Deutscher Bund*,
- associations of landowners for certain purposes, e.g. dyke cooperatives,
- religious associations outside the recognized national churches,
- economic cooperatives, e.g. in the form of public limited companies,
- associations for the prevention of risks (insurance cooperatives)
- and finally, the numerous associations for the pursuit of cultural, scientific, artistic and economic purposes (here Beseler meant the system of associations [*Vereinswesen*] that was emerging at this time).

This list is not reproduced in the subsequent literature on cooperative law in exactly the same way. However, it does serve the purpose of illustrating the manifold varieties of the cooperative system. It is crucial for the legal point of view that Beseler did not limit himself to stating the existence of such associations as a mere fact. Rather he drew a conclusion from factuality to legal validity: Cooperatives were not only a group of people, but legal persons. Thus he intervened in the famous dispute over the so-called fiction theory (*Fiktionstheorie*),³⁸ i.e. the dispute as to whether a cooperative exists as a corporation only if it is recognized by the state.³⁹ For Beseler, a cooperative as a legal person already obtains on the participants' corresponding act of constitution. Thus, however, he also recognises independent legal spheres in addition to the state, i.e. non-state social correlations, which produce law. This is because recognition as a legal person independent of the state corre-

37 BESELER (1843) 161.

38 HATTENHAUER (2000) 33 ff.

39 BESELER (1843) 173.

sponds to autonomy: a right to make laws with regard to its internal organisation.⁴⁰

This connection between the cooperative and autonomy is also emphasized in later literature. Thus Bähr, a conceptual soulmate of Beseler,⁴¹ writes:

“The legal importance of the cooperative thus does not merely consist in the fact that [...] it is regarded as a legal subject in relation to property transactions [...]; but it also generates in its interior a peculiar area of law which has as its object the rights and duties of the members of the cooperative as such.”⁴²

Bähr emphasises that this internal, state-independent norm-setting is not only of a contract law nature – and thus the application of law – but genuine law-making, a law-making that can draw its legitimacy from the autonomy of the associations.⁴³

This autonomy of associations as empowered to set “real” law is also retained by Gierke.⁴⁴ However, a change can be observed in his systematic legal classification of autonomy. Bähr classified autonomy as an institution of “cooperative law” (*Genossenschaftsrecht*), which in turn – at least partially – was a functional equivalent of public law. Gierke does not go that far. However, he only deals with the autonomy of the cooperative in the context of public law, making it thereby an institution of public law.⁴⁵ From this

40 BESELER (1843) 182 f.

41 KERN (1982) 412.

42 BÄHR (1864) 31 f.: “Die rechtliche Bedeutung der Genossenschaft besteht also nicht bloß darin, daß sie [...] in Beziehung auf den Vermögensverkehr als Rechtssubjekt gilt [...]; sondern sie erzeugt auch in ihrem Innern ein eigenthümliches Rechtsgebiet, welches die Rechte und Pflichten der Genossenschaftsglieder als solcher zum Gegenstand hat.”

43 BÄHR (1864) 33.

44 GIERKE (1895) 142, 150 f.

45 GIERKE (1873) 889: “Ein bei jeder Genossenschaft vorhandenes, wenn auch an Umfang ungleiches Gebiet öffentlicher Rechte entsteht durch das innere Leben des genossenschaftlichen Organismus. Das Verhältnis einer Gesamtpersönlichkeit [sic] zu andern Personen, die ihr als Glieder eingefügt sind, erzeugt nothwendig für die von der Verbindung ergriffene Lebenssphäre einen Kreis von Rechten und Pflichten, welche ein Analogon der in Staat und Gemeinde begründeten öffentlichen Rechte und Pflichten bilden. Diese Rechte haben daher selbst dann, wenn die Körperschaft im Ganzen nur für Privatrechtsw Zwecke besteht, einen öffentlichrechtlichen Charakter. Denn insoweit es sich um den Aufbau eines korporativen Organismus handelt, entstehen Verhältnisse einer Allgemeinheit und ihrer Glieder [...]. Insbesondere hat zunächst jede Genossenschaft das Recht der Autonomie [...] und [...] damit [...] löst der Begriff der Autonomie sich vollkommen von dem Vertragsbegriff als der Willenseinigung mehrerer Subjekte.”

point of view, Gierke's concept of autonomy stands for a legislative power of non-state actors equal to that of the state and thus for genuine legal pluralism. Gierke has often been perceived in this way.

However, this view needs qualification in the light of Gierke's far more differentiated conception of autonomy in his later work, *Die Genossenschaftstheorie und die deutsche Rechtsprechung*. Initially, one can gain the impression of a comprehensive regulatory power of the cooperative when Gierke constructs these cooperative communities in analogy to the state. However, the fact that he situates the cooperative in different legal spheres already entails some initial constraints. The distinction between "individual sphere" and "common sphere" (*gemeinheitliche Sphäre*) is essential.⁴⁶ In the individual sphere, the members of the association and the association itself exist as individuals with their own subjective rights; from a legal point of view, everyone exists for themselves. The association wields no regulatory power by means of which it could intervene in the subjective rights of the individual members. Not only does this mean a substantial limitation of the association's power vis-à-vis its members, but it also represents a limitation of that power by state law. For the subjective rights of the members usually arise from corresponding rules of state law. Only in the common sphere or sphere of "social law" (*Sozialrecht*) – that sphere whose members function not as individual legal subjects, but as elements of the totality – does the cooperative enjoy comprehensive autonomy and therefore legislative power.⁴⁷

A further restriction is no less important. Whereas the early Gierke routed these parts of cooperative law to public law, he is now opts for a momentous dichotomy: on the basis of the existing rules of positive law, he notes the existence of some cooperatives organized under public law and others under private law. Both types of cooperatives are entitled to autonomy – in the area of the common sphere, i. e. social law. However, this results in different laws. Public cooperatives are endowed with public authority; the law produced by these cooperatives has the character of statute law.⁴⁸ And while private cooperatives also produce objective law, it only holds for "their area", that

46 GIERKE (1887) 174 ff.

47 Also drawing attention to the importance of this distinction, Bock (1994) 89.

48 GIERKE (1887) 168: "Die autonome Satzung nimmt an den Eigenschaften des Gesetzes Theil."

is, only within associations. It cannot claim a binding force equivalent to the statute law,⁴⁹ and courts are not bound by it.⁵⁰

2.2 Autonomy and divided power – public law perspectives

Another perspective on the legal institution of autonomy focuses on the question of how it parcels out state power within a state, i. e. how power is distributed amongst different actors. This is the public law perspective. In Germany, that distribution could be addressed both within an individual state and, from 1871, within the state as a whole. Thus, the question was to what extent sovereignty was conceivable within state sovereignty.

After the end of the Old Reich at the beginning of the 19th century and the consolidation of the (partly new) states of the *Deutscher Bund*, only two communities that did not fit into the arrangement of national sovereignty remained the subject of debate within the literature. The port cities of Rostock and Wismar enjoyed a peculiar status due to old and fiercely defended privileges (in the case of Rostock) and guarantees from the Swedish Crown, to which Wismar had belonged until 1803. They were neither sovereign city states (unlike Hamburg) nor municipalities that could issue their own by-laws within the framework of state laws and under state supervision. Rather, they were entitled to enact their own laws, even if these deviated from state laws. The literature took this as a clear case of autonomy.⁵¹ One could, of course, simply dismiss the autonomy enjoyed by the North German port cities of Rostock and Wismar as utterly unique and thus of little relevance. Yet both cities are cases where autonomy emerged in its clearest form, namely, as the right of a non-state actor to enact, in his own right, legal provisions that were equal in status to state law and could even derogate it.

49 GIERKE (1887) 164: “ihre statutorischen Normen sind in den Augen des Staates Privatsnormen und nehmen in keiner Weise an den publicistischen Eigenschaften der Gesetze Theil.” Also, on the result: GIERKE (1895) 151. Less clearly, by contrast, BESELER (1866) 75, who states that “statutes, even if they have legal force (*legis vicem*), are not yet actual laws” [dass “Statute, wenn sie auch Gesetzeskraft (*legis vicem*) haben, noch keine eigentlichen Gesetze sind”].

50 GIERKE (1887) 164 fn. 2.

51 So summarizing the probably dominant opinion REISS (1902) 8 ff.

Much less unequivocally subsumed under the legal institution of autonomy was another case of shared sovereignty, the legislative law of the individual federal states of the German Reich. The background to this is provided by the conception of sovereignty of late constitutionalism's leading scholar of public law, Paul Laband. According to Laband, although the federal states still existed alongside the German Reich as subjects enjoying the condition of states, there could only be undivided sovereignty, and it was held by the Reich. Consequently, the individual states were left only with "autonomy", an authority to legislate that belonged to their original rights.⁵² This conception was not self-consistent⁵³ and deviated from the general understanding of autonomy, which conceived of it in terms of corporate autonomy,⁵⁴ i. e. as the regulatory power of entities within the state and thus sub-state entities.⁵⁵ Therefore, as a legal concept for the dogmatic description of the regulatory powers of individual states within a federal state, this understanding of autonomy was ultimately unable to prevail.

In contrast, the concept of municipal autonomy proved to be more durable. This in itself was nothing new. Even in older debates, municipalities had been recognised as bearers of autonomy.⁵⁶ But it was Otto Mayer who defined municipal autonomy in accordance with modern administrative law, thereby distinguishing it clearly from old concepts of cooperative autonomy. In Mayer's terms, communal autonomy was the legislative power that the municipalities were entitled to in their own affairs on the grounds of their right to self-administration.⁵⁷ This autonomy was an expression of a genuine, albeit derivative, authority.⁵⁸ The break with the traditional concept of autonomy becomes apparent in the fact that Mayer did not grant autonomy to associations with a membership structure, like water cooperatives, even if they were associations with a public law structure. For Mayer,

52 LABAND (1876) 56 ff., 107 f.

53 One could argue with good reason that the legislative power of the individual states did not result from their own law, but was based on a corresponding competence norm of the constitution of the Reich, PAULY (1993) 194.

54 Stressing this point GIERKE (1895) 142 fn. 2.

55 KREMER (2012) 24.

56 KINNE (1908) 5 ff.

57 MAYER (1895) 126 f.

58 This became (from the end of the 19th century) dominant opinion in science by public law, HAUG (1961) 25, 39.

the decisive difference was that municipalities could also issue regulations whose effects were binding on non-members, whereas associations with a membership structure only had power over the members and therefore the binding effect of the regulations could only be extended to where a relationship of membership existed.⁵⁹ While Mayer's view partly met with criticism in the literature of the time,⁶⁰ in the end this clearly public-law understanding of autonomy prevailed, even if not terminologically. The concept of autonomy no longer plays an independent legal-dogmatic role in municipal law today, but the idea as such does so in so far as the norm-setting power of the municipalities is an integral part of the guarantee of municipal self-administration.⁶¹ This also reflects the development of the municipality "from a societal corporation to a public law local authority".⁶²

2.3 A special path? Lorenz von Stein's concept of autonomy

Largely forgotten is Lorenz von Stein's conception of autonomy.⁶³ It earns its place here as an impressive attempt to reconcile liberalism and etatism as well as, to this end, to understand self-administration and state administration not as opposites but as cooperative relations.⁶⁴ Stein understood autonomy as the "right of the constitutional organs of the legal person to issue ordinances and decrees within their competence and to implement them through their own organs".⁶⁵ At first glance, this definition does not seem to differ from traditional understandings of autonomy. However, Stein's conception of autonomy includes not only the right to legislate but also the right to enforce these legal norms. In this way, the concept of

59 MAYER (1895) 129. In a later edition Mayer relativized his statement somewhat and granted "exceptionally" autonomy to other public corporations as well, but only if they were granted the power by statute to regulate with external effect, which was very rarely the case, MAYER (1924) 87 fn. 11.

60 KREMER (2012) 26 f.

61 See, for example, MEYER (2002) 71.

62 HOFMANN (1965) 270.

63 More detail on this in COLLIN (2014) 170–176.

64 SLAWITSCHKE (1910) 102 f.

65 STEIN (1869) 61: "Recht, vermöge der verfassungsmäßigen Organe der juristischen Persönlichkeit Verordnungen und Verfügungen innerhalb der Kompetenz derselben zu erlassen und dieselben durch die eigenen Organe zu verwirklichen".

autonomy is first liberated from the traditional context of discussion (autonomy as a source of law) in order to construct a coherent complex of norm-setting and norm-enforcement authority. At this juncture it soon becomes apparent that Stein is not concerned with the legal-dogmatic elaboration of individual legal institutions, but rather with the holistic consideration of public task correlations.

The originality of Stein's view becomes even clearer when it comes to the matter of who bears this autonomy. His considerations of an administration that is at once socially proactive and liberal serve as his starting point. For him, self-governing corporations (*Selbstverwaltungskörperschaften*) and associations were an essential structural element of such an administration. This amounts to a demarcation between state and society that deviates from the usual pattern. For Stein, associations in the broader sense are divided into associations (in the narrower sense) and societies. While the former also include general interests in their designated aims, the latter are limited to the realization of private individual wills. Only associations in the narrower sense are part of Stein's conception of administration. Together with the self-governing bodies organised under public law, they form the "free administration" ("freie Selbstverwaltungskörper"), which is thus separated from the direct state administration.⁶⁶ This free administration is the holder of autonomy.

This also clarifies the difference from the cooperative concepts described above. Autonomy is not legitimised simply by the cooperative constitution of associations of persons, but by the fact that these associations fulfil public tasks. In other words, the recognition of self-regulation by collective non-state actors is not only justified from the point of view of liberal individual guarantees, but also by their public purposes.⁶⁷ Here we see the connection with Stein's concept of the "freedom" of the administration. On the one hand, the administration is supposed to integrate and implement legal requirements, which has two corollaries. First, while not entitled to the right to determine the *what* of their tasks, it was granted extensive freedom to dispose with regard to the *how*, and thus also a comprehensive conceptual leeway.⁶⁸ On the other hand, freedom – in the sense of the self-determina-

66 STEIN (1869) 14 ff.

67 SCHEUNER (1978) 298.

68 STEIN (1869) 64.

tion of the individual – was to be realised no more and no less than through participation in the administration. This participation was taken to establish a balance between the individual will and the general will.⁶⁹

As we all know, Stein's concept was not incorporated into any subsequent legal systems. The comprehensive conception, formulated in a style much like Hegel's and elaborated in a relatively abstract fashion, swam against the contemporary tide of a positivistic ordering of the material by way of sub-disciplinary division. The far-reaching claim to representation and explanation could only be accomplished by partly sacrificing professional depth, and the work was thus of little practical use.⁷⁰ Also, the "formulation(s) held in Hegelian fogginess"⁷¹ might have deterred many readers. What remained, however, was the elaboration of an understanding of autonomy that, with regard to the legal reality of the emerging interventionist and welfare state, was much better suited to analytically grasping manifestations of private-state coordination since it had a broader scope both with regard to the forms of regulation and with regard to the actors. In contrast to the model of autonomy that conceives of it as a source of law, Stein's version also covered sublegal regulations and their enforcement; and unlike the later understanding of autonomy as relating to legal persons under public law, it also included associations under private law.

2.4 Autonomy in the 20th century – a swan song?

In the course of the 20th century, the legal institution of autonomy gradually disappeared from legal textbooks and legal debate. There were two main reasons for this. On the one hand, the tradition of cooperative thinking no longer flourished, or at least no longer played a decisive role. Thus, autonomy had also lost an important theoretical-conceptual foothold. On the other hand, autonomy became superfluous in the doctrine of legal sources. When public corporations issued a statute on the basis of a legal authorization, this statute itself was a source of law. It was no longer necessary to resort to autonomy.⁷²

69 KOSŁOWSKI (1989) 166 f.; similarly, much earlier, HUBER (1965) 129 f.

70 STOLLEIS (1992) 391 f.

71 SLAWITSCHKE (1910) 102 ("in Hegelscher Nebelhaftigkeit gehaltenen Formulierungen").

72 KREMER (2012) 31 f.

The concept of autonomy only has a legal-dogmatic function in special areas of application, in respect of which the debate has been split up into numerous special discourses. These include the traditional autonomy of the corporation⁷³ and, above all, the autonomy of associations (*Vereinsautonomie*) and collective bargaining (*Tarifautonomie*). The term “association autonomy” describes the right of associations to shape their structure and their internal relations in a self-determined way; the core of association autonomy is statute autonomy (*Satzungsautonomie*).⁷⁴ In its detail, association autonomy poses many legal problems, but it does not affect fundamental issues of the relationship between state law and non-state norms: the state’s monopoly of legislation or the monopoly of recognition of the law (*Rechtsanerkennungsmonopol*⁷⁵) is not called into question. The case of collective bargaining autonomy is similar: it is to be understood as the constitutionally guaranteed right of employers’ and employees’ associations to stipulate rules for the shaping of working conditions independently of state influence. This, too, has repeatedly raised hotly debated legal-dogmatic questions and its legal nature is still controversial today;⁷⁶ nevertheless, it is a very special and, at the same time highly, complex field which has moved away from the “general” legal system more than other legal areas due to its extraordinarily strong embedding in the political and economic system.⁷⁷

Apart from these legal-dogmatic uses, autonomy has recently experienced a kind of renaissance,⁷⁸ though not as a legal-dogmatic concept, but as a key concept of civil law theory and legal policy. The background to this development is chiefly provided by the debates about private norm-setting in the globalized world. Autonomy is one way of justifying private legislation.⁷⁹ Here, references to epistemic authority or to liberal civil-society ideas of democracy predominate.⁸⁰ As far as the latter is concerned, it might be added that the reference to the sources of liberal self-organization has shifted.

73 PAPENFUSS (1991) 23 f.

74 SCHOCKENHOFF (1993) 39; BÄR (1996) 159 ff.

75 BACHMANN (2006) 182.

76 See on this aspect BUCK-HEEB/DIECKMANN (2010) 198 ff.

77 For recent developments regarding this specific feature of the autonomy of collective bargaining, BENDER (2018).

78 See, above all, BUMKE/RÖTHEL (2017).

79 BACHMANN (2012) 215 f.

80 In an elaborated form CALLIES (2001) 85–110, especially 96 ff.

The concept of cooperatives, originally shaped by legal *Germanistik*, was ascribed – almost certainly against the background of national socialism – to a Western European tradition of thought committed to the idea of pluralism.⁸¹ Whether this is historically true remains to be seen. But it also shows that the originally all-powerful, *Germanistic* legal-historical legitimation no longer plays a part. Finally, the concept of autonomy has also landed in feminist jurisprudence, where, in its variant of individual autonomy, it is deployed to give legal underpinning to feminist postulates.⁸² In all these cases, however, the somewhat interchangeable use of the term as a catchword or as a collective term for similar legal phenomena or lines of argumentation predominates: it is no longer associated with any concrete, legal-dogmatic consequences.

3 Conclusion

Autonomy denotes the legal possibility to bring special interests to bear in legal normative terms. In the German tradition, however, autonomy did not refer to special orders of large ethnically, religiously, or culturally defined population groups, but to a legal regime of local units or associations or groups of persons that were traditionally of particularly prominent status.

Autonomy was understood as a source of law. Rules created by the bearers of autonomy were seen as objective law, not just as an articulation of the application of law. This was also the decisive characteristic of the distinction between autonomy and private autonomy, even though this distinction was only to become fully established at the end of the 19th century. Private autonomy merely conveyed the power of self-determination concerning the application of law.

But the combination of autonomy and legislative power also sowed the seeds for emancipatory approaches. These emerged above all in cooperative concepts of autonomy. A look at the basic elements of these approaches first

81 As early as the 1960s, WIETHÖLTER (1968) 181, called for “a politico-cooperative society of Western European tradition to take the place of the German-style authoritarian state” (“eine politisch-genossenschaftliche Gesellschaft westeuropäischer Tradition an die Stelle des herrschaftlich-anstaltlichen Staates deutscher Prägung zu setzen”); similarly today, BUMKE (2017) 35 (“autonomie as a Western ideal”); BUCK-HEEB/DIECKMANN (2010) 258.

82 BAER/SACKSOFSKY (2018).

reveals the image of a pluralistic legal order in which associations create their own law on an equal footing with the state. In particular, Gierke's legal-systematic refinement of the concept embedded autonomy in the existing legal order. The superior legal power of the state remained untouched, as did the subjective rights of association members. The liberal impetus, however, persisted. The concept of autonomy as part of a new understanding of the state was mobilized by Lorenz von Stein, who aspired to integrate societal associations into the fulfilment of public tasks. But this approach soon fell into oblivion.

From the end of the 19th century onwards, the concept of autonomy was progressively given an etatist gloss as it shifted to sphere of the competences of public corporations. This ultimately made autonomy superfluous as an independent legal institution. When it came to making laws, state authorization replaced it and the statutes issued on this basis were recognized as a source of law.

Autonomy has not disappeared from the current jurisprudential debate. However, it is no longer a legal institution of central importance but has drifted into numerous special discourses with their respective special autonomies. It no longer has overarching significance as a legal-dogmatic concept with normative consequences, but as a legal-political buzzword or as a collective term that is more descriptive than anything else.

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Construction and De-construction of Legal Identity: Different Notions of Autonomy in Italian Legal Thought (19th–20th Centuries)

Autonomy was an important notion in Italian legal doctrine from the mid-19th century to the fall of Fascism and the enactment of the Republican Constitution in 1948. Its use and meaning, however, were different according to the disciplinary field and the goal that jurists aimed to achieve. This paper will provide some examples concerning: (1) the role played by the concept of autonomy within public and constitutional law, first as an argument to emphasize characters of a national legal identity after political unification in 1861 and later – especially in the second decade of the 20th century – as a way of underlining the pluralism of (legal) orders within the state; (2) how autonomy impacted private law and the Civil Code of 1865 by both reshaping abstract formulas in contract law and contributing to creating separate disciplines such as labor law; (3) the theoretical struggle over the autonomy of will as the philosophical and legal justification for punishment, which adherents to the classical school and advocates of the positivistic school were confronted with from the 1880s until World War I. In these different cases autonomy was used as a discursive tool to consolidate the legal order or, on the contrary, to dismantle it.

1 From medieval municipal autonomy to a centralized state ... and back

Following a trajectory quite similar to what Peter Collin has described with regard to Germany,¹ in the Italian case medieval history provided model experiences of political and legal autonomy which became particularly meaningful for the process of political unification of the state in the 19th century. On the verge of unification, legal culture played a key role in stressing the

1 See the contribution by Collin in this volume; COLLIN et al. (2012).

existence and legacy of an Italian legal tradition whose roots could be traced back to Roman law and medieval jurisprudence as a demonstration of a long-standing and uninterrupted national legal identity.² Within this rhetorical framework, Federigo Sclopis³ and Vincenzo Gioberti⁴ associated the autonomy of the commune to the notion of absolute freedom, independence, and sovereignty in order to stress the continuity between this foundational past and national independence, to be achieved through the Risorgimento.⁵ Such an (historical) interpretation of the medieval municipal experience was rather unusual and clearly politically oriented. According to a more traditional perspective, the autonomy of the *civitates* had to be understood in terms of the relationship between different legal orders of different scales: empire and cities, the whole and its parts, central and peripheral powers.⁶ Autonomy, in this sense, was referring to the commune's power of enacting territorial laws (*potestas condendi statuta*), having its own judges and courts (*iurisdictio*), levying local taxes, even though the commune was still legally considered subject to the upper imperial power. Like a pendulum, the notion of autonomy swung between the two historiographical meanings of independence or of multi-normativity and pluralism of legal orders: if the former seemed to be more functional to legitimize and corroborate the unifying effort, the latter was applied to describe and substantiate the complex institutional and legal framework of a nationalizing project which had to realize unity without obliterating the particular and distinct regional legal identities.

Autonomy thus became a concept as well as an argument to claim a “resistance” confronted with a centralizing and standardizing state-building process which was perceived as disrespectful and oppressive of the local communities’ legal identity and power. Advocates of a federalist state referred to autonomy in order to shape institutional balances capable of preserving a margin of self-government and freedom to each territorial state:⁷ this tension between center and periphery characterizing the pre-

2 CAZZETTA (2018); PIFFERI (2018); COSTA (2013); SPINOSA (2013).

3 SCLOPIS (1863) 142, first ed. 1840.

4 GIOBERTI (1843) 13–18.

5 COSTA (2014) 724–733; MANNORI (2014) 101–106.

6 This is the prevailing interpretation of the notion of autonomy even in recent historiography: see e.g. GROSSI (1996).

7 MANNORI (2014); MANNORI (2007); MERIGGI (2011).

unitarian period can be seen for example with regard to both constitutional law⁸ and the process of civil codification.⁹ Even after 1861, however, this tension did not completely disappear into a homogeneous discourse emphasizing the role of the central state, but some federalist projects and proposals even persisted in the 1940s.¹⁰ In the field of administrative law for example, it characterized the debate on the role of the prefect (*prefetto*) and the allocation of powers between central government and local powers.¹¹ In the field of criminal law, the debate on the abolition of the death penalty led some prominent scholars, including Francesco Carrara who was the most influential,¹² to openly maintain the preservation of different regional codes of punishment rather than being absorbed into a national uniform legislation forcing the application of capital punishment.¹³

The more the role of the centralistic state was strengthening in the last decades of the 19th century, the more the notion of autonomy was losing significance as well as any federalist project. As Vittorio Emanuele Orlando – the leading public law scholar at the turn of the century¹⁴ – clearly pointed out, the medieval history of local sovereignty and jurisdiction, which finds a kind of parallel in federal states such as the United States and Switzerland, was inconceivable in continental modern states such as France and Italy, in which

“the source of sovereignty is unique, and no limitation is admitted neither of the medieval type nor of a federal type. Territorial districts [e.g., provinces and communes] therefore, the larger ones as well as the minor ones, shall be purely and simply considered as organs of the state, and all their activity is nothing but a consequence of a delegation of powers which the state gives to them.”¹⁵

The notions of liberty, autonomy, and decentralization took on meanings different from historical precedence, which referred to a plurality of powers and legal orders and were somehow absorbed into a monopolistic state erasing whatever form of competing or self-ruling power. The English con-

8 MANNORI (2018).

9 SPINOSA (2017).

10 MALANDRINO (2014).

11 ROMANELLI (1995).

12 CARRARA (1870a and 1870b).

13 GERI (2005); CAPPELLINI (2007); SBRICCOLI (2009).

14 GROSSI (2000) 28–37.

15 ORLANDO (1892) 139–140.

cept of self-government was, according to Orlando, unusable with regard to the Italian experience, due to historical and cultural fundamental differences.¹⁶ The path was marked for a clear shift, at the same time dogmatic, methodological, and terminological, which was realized by Santi Romano at the turn of the century.¹⁷ considerably influenced by Laband's and Jellinek's theories, Romano dismissed the notion of autonomy, too burdened with historical legacy, and conceived the notion of *autarchia*, derived from the German concept of *Selbstverwaltung* and – with some strained interpretation – from the English notion of self-government as a tool to definitively sterilize municipal autonomy and absorb any claim of pluralism into a monolithic 'absolute' state.¹⁸

The reappearance of the word and notion of autonomy is due to a rethinking (and to later writings) of the same Santi Romano. His cultural trajectory is characterized, from the first decade of the 20th century, by a marked criticism of the formalistic, abstract, and absolutist conception of the modern state shaped by the continental legal culture since the French Revolution, whose crisis was, according to him, by then plainly manifest.¹⁹ The unveiling of the modern state's simplistic illusions led Romano to embrace a pluralistic approach in his book *L'ordinamento giuridico* (1918), in which he strongly argued for the existence of autonomous legal orders within the state.²⁰ In 1945 he finally summarized the need to recognize the importance of the notion of autonomy in its proper and particular meaning, which refers to both self-determination and the power of a group/body/institution to produce its own legal order.²¹ Romano's attention was no longer focused on the relationship between central and peripheral powers (state and munic-

16 ORLANDO (1892) 144–152.

17 ROMANO (1899 and 1911).

18 RUGGE (1993); SORDI (2014); GUSTAPANE (1980); CIANFEROTTI (1998), ch. VII; BERSANI (1990).

19 ROMANO (1950 [1909]); GROSSI (2012); SANDULLI (2009) 167–171.

20 GROSSI (2008); CASSESE (1972); COSTA (2002).

21 See ROMANO (1953) 14–30: He argued that “the word ‘autonomy’ has different meanings in the field of law. In its broader and more generic meaning, it refers to every possibility of self-determination and, therefore, to active capacities, powers, and subjective rights. In a more specific meaning [...] it indicates: subjectively, the power of giving themselves their own legal order, and, objectively, the distinctive character of a legal order which is self-constituted by individuals or bodies, as opposed to the character of legal orders which are constituted by others” (14). See also CAZZETTA (2014).

ipalities), but on the very existence of groups, associations, bodies of varied nature, competencies and goals, which created and applied their own normative order even though they were still part of (and subjected to) the law of the state, and whose increasing significance in influencing and directing the social life of many citizens was nothing but the proof of the legal complexity of 20th-century society.

The possibility of having an autonomous legal order comprehended within a superior order, which may also determine the conditions of its constitution, does not necessarily imply the amalgamation and absorption of the former into the latter: there will certainly be a (more or less strict) connection between the two or more orders, but this does not exclude autonomy, which means independence that, however, is not absolute but may be expressed on different levels.²² This first pillar of autonomy in Romano's thought (the second one refers to individual autonomy, that will be discussed in the following paragraph), his model of the relationship between monism (state) and pluralism (groups and legal orders), will make a significant impact on the public law of the 1920s and 30s,²³ and will also have a momentous influence on the debate of the Constituent Assembly, especially with regard to the formulation of art. 2 and the contribution of jurists such as Giuseppe Dossetti or Giorgio La Pira.²⁴

2 The crisis of individual autonomy in contract law and the rise of social-special laws

Starting in the 1880s, Italian civil law doctrine was confronted with the so-called discovery of the social question, rising welfare-state legislation, and the crisis of the centrality of the code as bulwark of the unity of the law.²⁵ Within the broad range of issues related to this subject which have been investigated by legal historians in the last decades, I would like to stress just two points. The first concerns the rethinking underwent by the liberal key notion of individual contractual autonomy in face of the social critiques against the abstract formula of the Civil Code of 1865 and its exaltation of

22 ROMANO (1953) 16.

23 COSTA (1986) 124–135.

24 FIORAVANTI (2017).

25 CAZZETTA (2002); RODOTÀ (1995) 318–326.

(only) formal equality in spite of ever-growing social and economic inequalities.²⁶ The overemphasis (rooted in the doctrine of natural law and formalized in the Napoleon Code) which the code gave to the contract as the utmost manifestation of individual freedom and autonomy as well as the perfect combination of free mutual consent by equal individuals, was questioned by the unveiling of social disparities, especially between employers and employees and the fiction of their equal freedom to contract. Autonomy was overcome by the need of rebalancing these positions, asking for laws more correspondent to – and more consistent with – the real conditions of real individuals.

Individual autonomy, in this sense, had somehow to be integrated, corrected, or equalized by an external intervention of the state providing legal protections (such as mandatory insurance against personal industrial accidents to be paid by employers), welfare, and social security rights. In Italy, as in many other European countries, this claim led to the enactment of a growing number of social-special laws in an increasingly broader range of social and economic fields.²⁷ The crisis, or at least weakening of individual autonomy, can be here exemplified with regard to two different cases. The first case refers to the gradual elaboration and legal implementation of the notion of collective labor agreement, a new form of contract with *erga omnes* mandatory effects agreed upon by the employer and a collective body (e. g. workers union): notwithstanding the firm opposition of some leading jurists who feared the disappearance of the pivotal principle of autonomy²⁸ and, as a result, of the very autonomy of codified civil law, the collective labor agreement gradually gained doctrinal and legislative recognition.²⁹ The second case, in which again the notion of autonomy was at stake, concerns the possibility that, starting in the 1880s, a judge was partially but increasingly allowed to somehow modify, integrate, or amend the very content of the contract freely agreed upon by the two parties. This attack on autonomy was, once again, justified by the need to interpret and apply any contract with equity, namely on the one side, to go beyond the strict rule according to

26 CIMBALI (1885); SALVIOLI (1890).

27 GABBA (1901); ROSELLI (1951); CAZZETTA (2017a); CAZZETTA (2007), ch. 3; MANNORI/SORDI (2004) 409–413.

28 BARASSI (1901).

29 MARCHETTI (2006); CAZZETTA (2007), ch. 7; CAZZETTA (2017b).

which the contract was as binding as the law between the parties and, on the other side, to recognize that unforeseeable circumstances could occur requiring a forced and judicial (i. e. outside and above individual autonomy) revision of the economic content of the agreement. The theoretical debate and judicial application of the so-called *rebus sic stantibus* clause under the 1865 Civil Code (which did not explicitly mention this clause), is a clear example of this approach: by following a systematic interpretive approach to the code influenced by the German school of Pandectists, scholars and magistrates started to conceive the admissibility of allowing the debtor the resolution of the contract or a rebalancing of the economic position in case of “excessive onerousness of the consideration” due to unpredictable causes aroused after the contract’s conclusion.³⁰

The second theme in relation to which the notion of autonomy was debated refers to the crisis of the centrality (or rather autonomy) of the civil code and the correspondent rise of autonomous branches of law regulated by particular dispositions and grounded on specific and more social-oriented rationale. Such an approach is particularly clear with regard to the building of labor law as an autonomous discipline different from the ‘common’ codified civil law: in this case, autonomy was used to define the boundaries of a field governed by principles which were no longer merely individualistic and entailed both a more solidarity-based interpretation of the law of contract, and a recognition of mitigation of the pure autonomy to contract. The pressure of workers unions, associations, and political parties undermined the liberal artificial image of individual autonomy, naturally inclined to achieve mutual interests and turned out to demand a kind of overturning of the notion of autonomy: rather than referring to free individual choices as a recognition of legal individualism, it started being used to refer to the collective autonomy of social forces and groups to produce and comply with their own normative order.³¹ Even in this legal discourse on labor law, autonomy, after being used as a prerogative of the individual, was turned into a discursive lever to shape a legal pluralism, which proved very fruitful in the process of founding the autonomy of labor law in the post-constitution period.³²

30 BARSANTI (1901); DUSI (1915).

31 SORDI (2018); CAZZETTA (2007), ch. 4–5; CAZZETTA (2016); GIUGNI (1989).

32 GIUGNI (1960).

3 Free will and determinism: the challenge of criminal positivism to the autonomy of the individual

A third legal field in which the notion of autonomy was highly disputed between the 1870s and World War II is criminal law. The liberal rationale of punishment, in Italy as well as in many other European countries from the Enlightenment, Beccaria, and the French Revolution, was retributivism. The underlying idea presupposed the notion of free will and of criminal conduct as an autonomous choice of the individual, without which any repressive punishment would be illogical and therefore unjustified.³³ The Italian Penal Code of 1889 was based on this view. However, since the publication of Cesare Lombroso's *L'uomo delinquente* (1876) and, above all, Enrico Ferri's foundation of the Positivist School of Criminal Law (1881), the notion of criminal liability rooted in moral responsibility as traditional and undisputed fundamental of criminal law was radically questioned.

Among the more radical changes claimed by these reformers,³⁴ maybe the most revolutionary was the frontal attack on free will and the acceptance of a deterministic approach. According to Ferri,³⁵ free volition and moral liberty, i. e. the freedom to deliberately make choices and direct one's own behavior, "is a pure illusion, derived from lack of conscience of the physiological and psychic immediate background of every of our voluntary decisions". Human beings think they are autonomous, but they are not so, and criminal law is falsely based on this illusion. Potentially, the consequences of such an idea could be tremendous on many points of criminal law: the substitution of prevention for repression, of dangerousness for liability, of indeterminate measures of social defense for fixed and determined sentences.³⁶ Therefore, it was strongly opposed by those advocates of a liberal penal law who feared nothing but the end of criminal law.³⁷ Here, my focus is limited to stress how the crisis of the liberal and individualistic notion of autonomy of will, which – as briefly analyzed above – characterized contract law at the turn of the century under the weight of rising social problems and actors, had a

33 FARMER (2016); LACEY (2016).

34 PIFFERI (2016).

35 FERRI (1900) 468.

36 GAROFALO (1880); LONGHI (1911); MARCHETTI (2016).

37 PESSINA (1914 and 1915).

parallel in criminal law as well. The epistemological influence of a naturalistic and scientific approach to crime and criminals as social phenomena to be understood and neutralized led to questioning the notion of autonomy as the necessary condition of any penal intervention of the state. Even though these theories were rejected and did not find normative implementation, their impact on the development of criminal law (in terms of social defense and dangerousness-oriented punitive intervention) was not inconsequential.

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Autonomy, Subjectivity and Diversity: Genesis and Logic of a Juridical-political Concept in Argentina (19th–20th Centuries)

1 Introduction: Autonomy between space and subjectivity

The concept of autonomy was unknown to the legal debate of traditional Hispanic-Latin American law of the 17th and 18th centuries. In order to think about the categories of what today would be called autonomy in terms of normative self-regulation, the signifiers that covered the ground were sovereignty, jurisdiction, or economic power. This state of affairs may be corroborated by the absence of the word in dictionaries as well as in jurisprudential knowledge.¹ As Alejandro Agüero has demonstrated, in the case of Argentina, autonomy entered the conceptual framework of public law as part of a move in the construction of a nation-state that would disarm the pretensions of the provinces, which called for a 'provincial sovereignty' in the context of an unstable language of local federalism. On the basis of that dispute, the concept of autonomy would be linked to the progressive disarticulation of a local order to permit the formation of a state founded on the idea of nation, for which it would use a new blend of languages deriving from international law and the nascent vocabulary of administrative law to suture the internal conflict.² In this way, the word 'autonomy' meaning a capacity for self-regulation within a given space would be articulated through a counter-conceptual opposition to 'sovereignty'. That is to say, amid the constitutional tension resulting from efforts to build a Republic composed of different provinces, the concept of sovereignty would be reserved exclusively to designate the supreme attribute of governance, which remained in the hands of the 'Nation'. Hence, the use of the word autonomy as an attribute of the provinces meant a diminution of their political and jurisdictional role. This pragmatic use of a displacement of signifiers allowed

1 AGÜERO (2014) 341–349.

2 AGÜERO (2014); CHIARAMONTE (1993).

old ambitions, conveyed through claims to provincial ‘sovereignty’ to be dispelled.³ Thus, as a consequence of the birth of a new language that resorted mainly to history for the construction of the imaginary subject of sovereignty (the Nation), a space would also be opened for the linguistic incorporation of new knowledge which, in the hands of constitutional law and history (1870–1930), would streamline the semiotic artefact of law by incorporating formulas that would become hegemonic towards the middle of the 20th century.⁴ Indeed, the word ‘autonomy’ would later be given muscle by the novel knowledge of Administrative Law, which would not only provide new hermeneutical resources for the deployment of the state phenomenon in progress but would also reinforce historiography by furnishing more refined concepts that would serve anachronistically to narrate the history of the Nation.⁵

This new phase of public law would find in territorial divisions new counter-concepts that would end up occluding the original sovereignty-related usage and inscribing the concept in a theory of organization that, by taking the state as its fountainhead, regarded anything that was not state sovereignty as the product of administrative dismemberment. In this way, the word ‘autonomy’ would be politically neutralized by being conceived as one of the forms of administrative organization. From then on, ‘autonomy vs. autarchy’ would be the dichotomous categories used to denote the degrees of self-government arising from practices of ‘centralization’ or ‘decentralization’ that were intended to be optimal for the scientific management of resources.⁶ Not in vain did Rafael Bielsa, one of the leading authorities on the formation of administrative law, reject autonomy on the grounds that it was a political resource for evading state control. For him, those institutions struggling for autonomy – universities, for example – were necessarily suspect.⁷

As can be seen, although for the contemporary reader this originally Kantian term clearly suggests a paradigm of practical philosophy corresponding to the actions of the subject, its first application in Argentina had to do

3 On language and performativity see: PALTÍ (2009) 13–22.

4 CHIARAMONTE/BUCHBINDER (1992).

5 CASAGRANDE (2014) 251–254.

6 CASAGRANDE (2014) 251–254.

7 BIELSA (1935) 103.

with the development of constitutional and administrative law. This is not surprising. That tardy evolution is bound up with the slow process of dissolving the structures of *Derecho Indiano*, which, in conformity with the logic of *ius commune*, looked more to status than subjectivities and, consequently, dealt with corporate territorial entities as bearers of privileges since it was not yet vertebrated around rights structured under the paradigm of the subject.⁸ Thus, the view of the city and, beyond it, the province as classic thorns in the side of political order shaped the constitutional structure. Only later would the legal subject, bearer of subjective rights, emerge from this progressive problematization; and only then would that subject's autonomous character emerge with respect to the 'Republic' that had to safeguard its rights.⁹ This new conceptual fold would allow the voice of autonomy to gradually migrate from the sphere of constitutional-administrative law to enter the sphere of private law.

That route was not a straight line. The very analysis of the concept of autonomy – which, in its civil law aspect, would merge into the syntagma 'autonomy of the will' – entails a two-fold, historical-conceptual critical operation. The first part of that operation requires the re-composition of the translation process in order to historicize (temporalize) the context of the syntagma's incorporation into Argentina's Ius-civilist tradition. The second part entails bringing to light how the critical use of this principle made it possible from within the sphere of civil law to conceive different forms of 'autonomy', which would produce, in turn, special categories of rights and diverse forms of subjectivity.

2 Autonomy of the will: Individualism and sociality

In the German-speaking world the concept of *Autonomie* has served to explain the freedom of subjects as well as the formation of a particular right of associations which breeds diversity through multi-normativity.¹⁰ In the case of Argentina, the concept has been reduced to the possibility of disposing of patrimonial property by means of a contract between parties, which, although subject to public order, manifests the freedom to contract. That is

8 CLAVERO (1990); TARELLO (1988).

9 CASAGRANDE (2018).

10 COLLIN (2014).

to say, what would later be recognized as ‘autonomy’ was to be found in the sphere of expressions of a subjective will that operated as a ‘source of obligations’.

In the *ius-civilist* doctrine there is widespread jurisprudence ascribing this principle to that stipulated by art. 1197 of the Civil Code of Vélez, which was in use from 1871 to 2015.¹¹ However, legal doctrine only began to identify the word ‘autonomy’ with art. 1197 of the Civil Code at the beginning of the 20th century: when the Code was drafted, no term was available to denote that meaning. Indeed, the word was not part of the language of the Civil Code of Vélez, nor was it known to the doctrine that presided lessons in civil law at the University of Buenos Aires.¹² Rather, instead of tracing ‘autonomy’ to its German source, it referred back to Hispanic law as the origin of that norm. Thus, in its preliminary rulings the Supreme Court stated:

“The [law] of Spain, in imitation of the Roman, established the same principle in laws 6, 7, 5 and 1^a, title 11, Partida 5^a; and in consonance with that radical jurisprudence our current Civil Code was established and said [...]: ‘The conventions made in contracts form for the parties a rule, to which they must submit as to the law.’”¹³

As can be seen, for the Supreme Court the article was treated as a continuation of the Hispanic model.

However, for some doctrine, the interpretation of the text emphasized Vélez’s note referring to the Civil Code of France (art. 1134), where the key concept was the ‘will’ of the subject. As a consequence, the ‘will’ of the subject, the very essence of subjective modernity, made its appearance, but the concept of autonomy was not central to declaring the subject’s freedom.¹⁴

In the first half of the 20th century this traditional civil law reading would be revised with the introduction of the concept of autonomy. Why did the tradition change and how did this principle arrive in the language of Argentine civil law? The crisis experienced by the liberal model in the face of the

11 Art. 1197: “Las convenciones hechas en los contratos forman para las partes una regla a la cual deben someterse como a la ley misma.” [“The conventions made in the contracts form for the parties a rule to which they must submit as to the law itself.”]

12 LLERENA (1900) 297–298.

13 Argentina’s National Supreme Court, Fallos (decisions): 23, 62, 1882.

14 MACHADO (1899) 529–530; SEGOVIA (1894) 195.

problems generated by industrialization and migration provided the setting for the translation. The phenomenon that would come to be known as the ‘Social Question’ raised a very specific question about the true autonomy of the workers in a situation of need to express a will that would be binding on them.¹⁵ Thus, the abstract equality that 19th-century civil thought took for granted as the theoretical basis for its functioning was problematized.¹⁶ In this context, looking back at the past ceased to be useful and the law had to be regenerated on the basis of the new civil doctrines that were being formulated in Europe, particularly in France.

This change of perspective would be given flesh in an innovative civil doctrine. In particular, it would be Alfredo Colmo and, through him, Raymundo Salvat, who looked to León Duguit and François Géný as models to help understand the need for civil law to be overhauled.¹⁷ In 1916 Alfredo Colmo published a work entitled *La Técnica Jurídica en la obra del profesor Géný* where he synthesized the change of perspective of French civil law theory and characterized its theoretical nature as

“ly[ing] in the almost systematic abandonment of what is common to French authors: of a jurisprudentialism, of a scientific fragmentation and of a casuism that are simply enervating. There are very few works of any importance which raise juridical edifices, ascending in high flight to the superior regions of law, where the latter rubs shoulders with other social disciplines (economy, politics, history, etc.).”¹⁸

On the other hand, he warns that “this evolution was due to the German example, above all to that of such eminent and brilliant scholars as Ihering, and to the adoption of the *Bürgerliches Gesetzbuch*.”¹⁹ Here we can recognize how the German method and language would be appropriated by Argentine civil law as mediated by the French channel. In this translation, however, some doctrinal usages of the originally German concept of Autonomy would be lost.

15 ZIMMERMANN (2013).

16 CARONI (2013) 48–49.

17 On the influence of Duguit in Argentina through its 1911 conferences see: ZIMMERMANN (2013) and HERRERA (2014). In fact, one of the conferences given at that time was called “*La autonomía de la voluntad*”, where Duguit presented a severe critique of the individualism of this principle.

18 COLMO (1916) 6.

19 COLMO (1916) 8.

As Jean-Louis Halpérin has demonstrated, both in the language of the Civil Code of 1804 and in the doctrines of the time, there was no such theory or term of any Kantian origin.²⁰ It would be later, through the conflicts resulting from private international law, that the expression would enter the French legal language. Only then would French civil law doctrine undertake its problematization, in particular, in François Géný's appropriation of the concept. However, Géný would filter the concept through a comparative national history by recovering the principle of the 'autonomy' of the private will and discarding the German version of 'legislative autonomy'. Indeed, he wrote:

"Telle semble bien être la portée de l'*Autonomie*, reconnue comme institution parallèle à la législation d'État par les jurisconsultes allemands. [*This was "l'autonomie législative, en droit allemand"*] – Toutefois, cette institution, qui ne va pas sans contrarier la souveraineté, exclusive et jalouse, de l'État moderne, et qui, par suite, perd de plus en plus de son importance, n'a plus, sur le terrain du fait, aucun domaine d'application incontestable en France, où tout régime de castes est aboli, la noblesse elle-même ne représentant plus qu'une distinction historique – [...] les groupements, doués d'une véritable homogénéité corporative, ne lient leurs membres par des statuts que suivant la loi générale et dans les limites fixées par celle-ci (autonomie privée en vertu de la liberté des conventions)."²¹

As a result of this French mediation, the civil law usage of *autonomy* that would later be recovered in Argentina trained its sights on the legal subject and his 'private autonomy', discarding the particular German usage (legislative autonomy) which squared ill with the idea of state sovereignty and the principle of equality. 'Private autonomy' became whatever action was taken in 'freedom of conventions'. Hence, after such mediation and appropriation of the German term via the French, the principle was condensed for direct assimilation into article 1197 of the Civil Code.

Thus, when Alfredo Colmo first began to use the expression, he no longer considered "legislative" gravitation but only the subjective matrix of will. In his *Técnica Legislativa del Código Civil Argentino* of 1917 – dedicated "*Al maestro François Géný*" – he dealt with the political problem of the Civil Code in connection with the tension between individualism and the "sociality of the law". In this regard, he criticized Vélez and warned that "it is an

20 HALPÉRIN (2014).

21 GÉNY (1913) 58–59.

essential and mainly individualistic code". Within this critique of individualism, the concept of autonomy made its appearance:

"Art. 1197 enshrines an exaggerated extent of the autonomy of the private will: hence it follows that any convention has the force of law as long as it does not attack inalienable rights; and as long as it is not possible to have it annulled in accordance with the stereotypical principles of error, malice or violence. There is, however, much more than one situation in which particular conventions compromise collective demands: such is the case of usurious loans [...], of labor contracts entered into in disgraceful conditions by workers pressed by hunger, who do not hesitate to accept clauses stipulating shameful fines or the arbitrary withholding of their wages; and so on."²²

On the coat-tails of the term autonomy, a radical critique emerged which operated on different planes. Epistemologically, thinking about civil law could not be divorced from historical, social and political experience, under the light of which the principle of 'autonomy of the will' had become a subjective excess which did not respect the collective role of law. Hence, in value terms, the principle itself was not conceived in a positive way, as equivalent to the legal subject's freedom, but had to be thought objectively in order to take stock of the injustice committed by not bearing in mind those 'disgraceful conditions'.

This social viewpoint was also shared by the authors of the 1936 Civil Code, a failed reform which, in its message of enactment, stated:

"Above all, and sometimes to the detriment of the autonomy of will and the sovereignty of contracts, we wanted our Code to breathe an atmosphere of less individualism, of greater ethics and collective solidarity. Thus, the principles of good faith and feelings of humanity constantly inspire the contractual rules, in order to limit powers that seemed excessive to us or to allow the emergence of new rights previously unknown."

That social perspective was also shared by commentators on the 1936 Civil Code Reform project. Professor Risolía said in a seminar that "as a consequence of this exacerbated social problem, the individualistic codes inspired by the liberal movement of the 19th century have suffered the attack of reformers sympathetic to the new theories." He went on to say:

"Positive legislation is naturally affected by this convulsion of ideas. It is not a matter of drawing up an index, but [...] the autonomy of the will is reduced in such a way

22 COLMO (1917) 91.

that contracts, formerly tributaries of morality, of custom, of tradition, have now turned towards the economic needs that dominate them.”²³

Years later, after the 1936 reform project was dead and buried, the question of autonomy and its limitation remained a central theme of doctrinal study. In volume V of his classic *Tratado de Derecho Civil Argentino* (1946), Raymundo Salvat provided a personal summary of the principle’s history. When analysing article 1197 he wrote: “it is the principle of the autonomy of the will, whose origin was in Roman law, whence it has passed to ancient and modern legislations, stimulated in the latter by the juridical and economic individualism that has characterized them for so long.”²⁴ As can be seen, with one stroke of the pen, he erased the history of the concept, transforming it into an idea that had been transmitted without interruption from Rome to the present. Later on, he took up Colmo’s criticism of the principle’s excessive individualism. However, Salvat would limit it for fear of state intervention in private contracts:

“The principle of the autonomy of the will has been severely criticized: it has been said that under its aegis, in many cases the greed and petty interest of unscrupulous persons will prevail over the accepted interests of society; that one of the parties will frequently impose abusive conditions on the other party, which the latter will be obliged to accept for reasons of necessity and circumstance, as is the case with usurious stipulations and others which represent a real attack on the social interest. These criticisms are in part well-founded. In fact, there is no overlooking the dangers of usury and other stipulations that actually compromise the economic future and the freedom of work of the weak party to the contract. But it cannot be ignored that the principle of the autonomy of the will has been and is also the source of incalculable progress in the economic order [...]”²⁵

For Salvat, the just solution was to find a middle ground between the autonomy of private will – which brought advances and economic progress – and intervention to limit it. Thus, as early as 1946, we catch a glimpse of the total assimilation of the concept that once again pivoted on the tension generated by socialization and the fear of state intervention.

As can be seen, the concept of autonomy entered doctrine in the middle of a process to re-configure civil law that spanned two historical phenomena: 19th-century individualism and 20th-century socialization. Thus, the critical

23 RISOLÍA (1940) 24.

24 SALVAT (1946) 105.

25 SALVAT (1946) 107.

gaze of the authors of the first half of the 20th century was blinkered by the limits imposed by the violence of 19th-century abstraction. Thus, too, the inequalities that had been covered over by the codifying mentality of the 19th century reappeared once law and society began to be viewed as an integral whole for the first time. As a result, at the very moment of its incorporation into juridical language, the concept of autonomy would be put in check, especially because of the ‘pressure’ to which “weak party to the contract” was submitted. Therefore, in order for the principle to be maintained, the abstract assumption of contractual freedom between equal parties had to be qualified in order to allow for the social conditions of the subjects. Thus, this dent to a structural element of civil law not only led to recognition of a wide range of social statuses under contractual obligation, but also to thought being given to the need for a new right that contemplated this “limited autonomy” of broad social sectors. Labor law would be the consequence of a social diversity that broke through the opacity of civil dogmatics.²⁶

3 Limited autonomy, regulatory autonomy: inequality and compensation

Labor law in Argentina was developed in tension with civil codification as it trained its sights on the relative situations of abuse and necessity between parties who could no longer be regarded as equals. Thus, when plans were being made for a special contract for employment, there was debate over whether it take the form of a modification of the Civil Code or, being an ‘autonomous’ branch of law, it should have its own tailored legislation and courts. The inequality inherent in the employment relationship entailed denying the *autonomy of the will*. In fact, one of the fathers of Labor Law in Argentina, Alfredo Palacio, wrote in 1930:

“If we study the Civil Code and look at article 1197, which establishes that the conventions made in contracts form for the parties a rule to which they must submit as to the law itself, we find the principle of autonomy of the will enshrined by the regime of economic liberalism. Modern labour legislation combats this legal provision by holding that in the private contract of a worker and a capitalist, the former

26 CARONI (2013).

is not a free agent, and that the time for which he can freely sell his labour force is the time for which he is obliged to sell it.”²⁷

It can be seen that by 1930 the concept of ‘autonomy of the will’ was already circulating among legal experts and that its limitation was central to the construction of a legal doctrine more in line with social reality. Hence the emergence of some premises of labor law, such as, for example, the ‘limitation of the autonomy of the will’ or ‘normative (collective) autonomy’.

The consequences of the principle of autonomy are key to thinking about the diversity of identities that the Labor Law was establishing. On the one hand, the social question implied adopting new premises to account for the juridical phenomenon, premises which would clear away the opacity of civil law dogmatics. This sociological, historical and political view of law discovered a diversity of situations (and status) that had been occluded by the premises of 19th-century liberalism. This, in turn, enabled a new subjectivity to arise from the separation between the needs of the private-civil law universe with respect to that of the world of work. As a consequence of that dialectic, new identities would arise that would be considered under the paradigm of the structural inequality of capitalism. This new legal subject (the worker) would accrue a novel identity proper to it that took into account its situation in the social system and required the due protection of the state; consequently, a distinction was introduced with respect to the principle of contractual equality.

Thus, the recognition of limited autonomy and the regime of collective agreements led to regulatory diversity which, from 1945 onwards, would also manifest itself as the social and cultural political identity of the worker vis-à-vis the rest of society. At the political level, the consequence would be confrontation between the world of labor and the so-called “oligarchy”.²⁸ But that was only one facet. Within the labor world, the suspension of the ‘autonomy of private will’ and the consolidation of a contractual practice conceived in terms of whole unions would also lead to the construction of diverse identities among the actors that joined different unions (depending on the labor branch). This is what explains why a worker identified with

27 ALFREDO PALACIO (1930), *La democratización de la enseñanza*, in: *Anales de la Facultad de Ciencias Jurídicas y Sociales de la Universidad de La Plata*, tomo V, 376. Quoted by STAGNARO (2012) 89–90.

28 ADAMOVSKY (2009).

Peronism would also have his identity defined with respect to the union he belongs to.²⁹

From the 1950s the anti-Peronist movement (which brought together socialists, conservatives and the Catholic Church) defended the cause of the ‘middle class’ as opposed to the Peronist worker. It was a thrifty, educated, independent class in which the key stakeholders were the ‘liberal’ professions – that is, those that did not depend on a union. Inevitably, that tension had an impact on how the autonomy of will was observed. The terminology of the different pension systems is illuminating in this regard: workers exist in a ‘relationship of dependency’, while the liberal professions are considered ‘autonomous’. So, the adscription to one pension system or another constitutes a symbol of status and class.³⁰ As a result, autonomy partially recovered its role as signifying independence, freedom and status and would temporarily gain the ascendancy during the anti-statism that accompanied the neo-liberal reforms of the 90’s.

The neoliberal doctrine sought to expunge the labor imaginary by re-founding a subject (even an employed subject) with full autonomy of will and thereby undermining the subjectivity created by law and politics between 1930–1989. This erosion, which has been painstaking analysed by labor sociologists paved the way for the return of an individual subjectivity that is no longer recognized as a worker and for the consequent re-configuring of the way the social world is represented.³¹ Thus, today, there is a discourse which tends towards meritocracy, radical subjectivity, and detachment from labor and collective ties and consolidates the eradication of labor identity by privileging cultural diversity over social or labor diversity. Hence, the continued attempts at labor reform and the discourses that further this goal.³²

4 Autonomy as *Leitbegriff*: the return of the subject

The radical critique of the state, the trade unions and any space for collective thought by the hegemonic discourses of neoliberalism have inaugurated a

29 LOBATO (2004).

30 GOFFMAN (1951).

31 MÚÑIZ TERRA (2012).

32 VASILACHIS DE GIALDINO (1997).

reconfiguration of the concept of autonomy. If in the 1930s its wings were clipped to avoid social conflict, in recent decades it was reformulated to suit a society broadly characterized by individualism and ‘singularization’. This pattern was not only local but global, too.³³ In the case of Argentina, a market-driven configuration of the subject was further apparent; in other words, consumption became the prime indicator of the subject’s social status and autonomy as, for a broad swathe of society, diversity manifested itself in the consumption of differentiated cultural goods. Meanwhile, for those vast sectors of the population excluded from the market model, identity was territorialized on the basis of structures defined no longer around labor but *barrios*.³⁴

This new context was defined by the passage from “citizens to consumers”, while the ‘autonomy of the will’ was recovered to signify the ability to negotiate in the market, but without state interference.³⁵ However, this claim to freedom was quickly jeopardized by inequality before an increasingly concentrated market. Thus, civil law turned its attention to ‘consumer law’ and its aim “to protect consumers from entrepreneurs who produce and put into circulation goods and services for consumption”.³⁶ Consequently, in spite of a new anti-statist configuration, social self-organization was sought through the ‘consumer associations’. This social (non-state) space intended to undermine the principle of art. 1197 of the Civil Code and therefore to avoid any ‘abuse of rights’ obtaining on the disadvantageous position of the consumer. A new limitation thus arose: the limitation of the autonomy of the will of the promisor. It sought to alleviate the situation of consumer helplessness vis-à-vis companies; thus, although the market moved towards self-regulation where the freedom of individuals was exercised without any interference from the state, the concept of autonomy soon entered a crisis.³⁷ Autonomy began to be viewed as the possibility of configuring a differentiated subjectivity through a logic of consumption-defined *distinction*.³⁸ This reinstatement of private autonomy as a capacity to choose would be funda-

33 RECKWITZ (2018).

34 SVAMPA (2005).

35 LEWKOWICZ (2006) 19–25.

36 GARRIDO CORDOBERA (2015) 2.

37 Article 42 of the reformed 1994 National Constitution deals with consumer law.

38 BOURDIEU (1998).

mental for another usage that made the concept the rationale for setting the ideal of subjects of right on a plane of equality, but within the cultural diversity of consumption.

At present, especially from 2001 onwards, social movements have re-appropriated the concept, expanding it from the exclusive context of consumption to enter the spheres of equality and personal freedom. This renewed paradigm in which the concept of autonomy has been inserted gradually no longer refers to contracting (or contractual freedom) but to the field of human rights. In fact, in the last two decades the topic of human rights has grown to become a paradigm from which to understand the law, and even an interpretative source of the civil law – new Civil and Commercial Code (art. 2). This is a response to an integralist take on the dignity of the person and democratization that pursues a society conceived on the basis of diversity.

However, for this to come fully to fruition, attention must be paid to the activities of social movements. They have been mounting a political bid to realize rights on the basis of diversity through the concept of autonomy. One example of this is the spread of autonomy beyond the sphere of economic contracts to considered as a right in the enactment of the law of marriage equality, which pursues a very specific agenda in terms of gender and diversity. Likewise, the term ‘autonomous’ has begun to break loose of images of disability (*discapacidad*). Thus, far from seeking the tutelary role, in place since the 19th century, of the state of the ‘disabled’ (*discapacitado*), modern international legislation and modern doctrine on the subject seek the autonomy of people with different abilities. In these regulations, autonomy is linked to a ‘dignity’ ensured through “individual autonomy, including the freedom to make one’s own decisions and the independence of persons”.³⁹

A final field of law in which the concept has received much attention in the last fifteen years is gender studies, where the principle of ‘autonomy’ has been linked to the possibility of establishing an equality policy that addresses three fundamental aspects: ‘economic autonomy’, ‘physical autonomy, free-

39 Convention on the Rights of Persons with Disabilities, approved by Law 26.318. In the same sense, article 152 ter. of the new Civil and Commercial Code states that decisions on disability will affect “individual autonomy” as little as possible. It is only at this point that the concept enters the legal field.

dom and rights' and 'autonomy in decision-making processes'. These correlative fields call into question the asymmetric relationship in which economic and legal institutions – of patriarchal origin – place women. In the field of gender studies, the logics of the labor market – in its production of inequalities –, the violence against women that affects physical and moral integrity, and the impossibility of political participation fostered by the state and its institutions have come in for particular criticism.

5 Conclusion. Autonomy: From will to diversity

The concept of autonomy in the history of Argentine legal languages is central. In its passage from the field of public to private law, there was a movement from territorial spaces and political institutions towards a vision that cast the subject of bourgeois-private law as the main actor of autonomy. This passage reveals how the concept's appropriation in private law produced a diversity of social status, without being able to contain the social conflict that would occur in the first decades of the 20th century. Indeed, the discursive retreat that served as a basis for its adoption (the problematization of the social question) facilitated rupture with the very postulate of equality that the concept had implied in the 19th century, giving rise to a constellation of diverse identities among workers (which would derive in labor law) that countered the bourgeoisie as an exclusive model of representation of social relations. However, the concept did not remain locked in this context but moved on to cultivate another semantic field when confronted, first, with the neoliberal discourse proposing an egalitarian reformulation through the simplification of social tensions under aegis of the market and the consumer; then, reaching its culmination in its assimilation into the field of human rights as the basis for the development of the recognition of diversity and equality.

At those different moments, what can be observed are the political uses of the concept, which behaves like a genuine *Leitbegriff* of the social movements of the region. This is evidenced in the internal temporalization of the concept that connects with the past by denouncing the lack of freedom implied by not enjoying an autonomous life, while the struggle for such freedom is expressed in the search for a greater independence that allows the diverse subjectivity of social groups to be expressed. What is significant is its current politicized projection as a way of thinking diversity in an exaltation of

autonomy. While in the 1930s it mounted a critique against an autonomy of the individual will that was seen as an abstraction that occluded divergent social positions and the conflict inherent to the mode of production, today we are witnessed to the politicization and social struggle of individuals claiming full autonomy and linked by a common problematic (solitude-common).⁴⁰ This new phase throws fascinating light on how a juridical-turned-political concept vertebrates the potentials and limitations of social protest. Autonomy shifted from state protection to a form of civil self-organization, so that the field of work became closer to legal sociology than to traditional civil law. The new connections between these disciplines are promising and the concept of autonomy currently provides much food for thought which, taking political philosophy and law as its instruments, will straighten out social phenomena.

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Section IV

Legal Person and Legal Personality

Masks of Legal Subjectivity: Equality and Difference within Personal Regimes in Brazil (1824–1988)*

1 Introduction

This contribution is an invitation to reflect, on a comparative basis (Ibero-America and Europe) as to how the law responded to social and cultural diversity during the 19th and 20th centuries. The topic chosen is that of the construction of a legal personality in relation to the tensions existing between legal-political projects based on the principle of equality, on the one hand, and the special legal regimes applicable to specific groups under Brazilian law, on the other.

Beside the issue of the considerable time-span proposed for discussion, the research controversy is rooted in a multiplex contemporary debate, which covers, *inter alia*, discussions about what theories of justice are adequate to plural societies;¹ about analytical and normative deficits in theories and policies related to multiculturalism;² and about struggles for redistribution and recognition in contemporary societies.³

Considering a strictly historical approach, a relevant historiographical trend in Brazil directly related this theme deals with the paths and dilemmas of citizenship construction. Such historiographical production is deeply influenced by T. H. Marshall's seminal work on citizenship building in England. Brazilian historiography emphasizes a citizenship concept defined as

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1 FORST (2002); VITA (2000).

2 BOCAREJO (2011); COSTA/WERLE (1997).

3 HONNETH/FRASER (2003).

the exercising of civil, political and social rights. The citizen is a rights holder. Based on this premise, researchers have investigated the differentiation of subjects in terms of which rights may be exercised, the struggles for rights recognition, obstacles and ambiguities against such exercise, and the expansion of full citizenship, which encompasses the three dimensions of rights.⁴ Such historiography reflects its time, i. e. the transition from dictatorship to democracy in the 1980s. This conjecture inserted new goals into the agenda: the return of political and civil liberties, the redeeming of social debt in an unequal society, and the new consensus around a democratic Constitution. The emphasis on the ‘Rights Talk’ makes sense in this context and was a response to the impetus of vigorous social movements in civil society.⁵

However, I will not follow this path, already proven productive elsewhere and represented in highly relevant works. Instead of taking “citizenship” as an organizing historiographical category, I intend to explore other normative semantic occurrences, in order to map out the effects produced by the legal categorization used to define types of legal subjects. It is important to have in mind the fact that citizenship, apart from representing a historiographical category, is also a native concept, which is part of the normative semantics of *longue durée*.

Diversity, in a productive sense for our purpose, refers to the definition of groups according to difference markers (gender, ethnicity, etc.). The members of a group, according to certain criteria of belonging, are equal among themselves in a certain aspect, and different from those who are not members and from other groups. Diversity is a relational concept – of the member of a group vis-à-vis non-members, and of a group compared to other groups.⁶ In this sense, diversity is a paradox that encompasses both equality (belonging to the group) and difference (between members, and between groups); it is the unity of identity and difference.⁷ Constitutions, since the

4 The best synthesis is that of CARVALHO (2004). For the 19th century and the beginning of the 20th century, see MATTOS (2000); GRINBERG (2002). For social rights, see GOMES (2005), SANTOS (1994). For discussion on the building of social rights in Brazil, see BERCOVICI/MASSONETTO (2004). For a discussion in a transregional perspective of inequality regimes, see GÓNGORA MERA (2019).

5 For social movements by the end of the Dictatorship, see SADER (1988); CARDOSO (1983).

6 DUVE (2014).

7 BASTIAS (2020); DE GIORGI (1998).

end of the 18th century, have set in motion an inflection in the unfolding of this paradox. The equality of people before the law becomes the default position, and inequalities need special justification.⁸

My contribution investigates the unfolding of this paradox in Brazilian law. It starts from the following premise: the principle of legal equality, as stated in the first Constitution of 1824,⁹ is combined with the creation of special legal regimes applicable to certain groups of persons. The major thread of my contribution is to investigate how normative (legal) categories integrate equality and differentiation. Mainly, I scrutinize three kinds of justifications to differentiating regimes of legal subjects (2–4): I will call them ‘subordination’, ‘disciplination’ and ‘assimilation’. Each regime is a ‘mask’, which corresponds to one specific legal subject. The metaphor of the mask to reflect on the concept of person, which has a long history, has been used here to express a synthesis of the legal regime of justification of differences.

Thereafter, I will examine the aim of the Federal Constitution of 1988, in force nowadays; in spite of the many barriers to its effectiveness, it represented a point of inflection towards the above-mentioned regimes (5).

Three masks of three different kinds of subjects as configured by legal normativity: this inventory is far from exhaustive. Other masks might as well have been analyzed. They do not exclude each other, either: one such group, as ‘Indians’, can be classified as subordinate, disciplined, or assimilated. Masks are resources which emphasize, in one way, some single aspects, and may be matched to assist in the interpretation of a specific historical situation.

My argument is not analytical, as it does not aim at the conceptual clarification of the principle of equality,¹⁰ nor is it an exhaustive discussion of the concepts constructed by proponents of legal dogmatics about legal subjectivity. Indeed, the term ‘legal subjectivity’ is an open category for exploring some of the distinctions produced by law. Nor do I advocate a normative argument for justifying the best principle capable of recognizing people’s rights.¹¹ My focus lies on the issue of the legal construction of a personality of equal subjects, in the context of diversity in the population as a whole, from a legal-historical perspective.

8 See the introduction by Collin and Casagrande in this volume.

9 Years of Brazilian Constitutions: 1824, 1891, 1934, 1937, 1946, 1967, 1969 and 1988.

10 See KIRSTE (2019).

11 In his comment to this paper, Stephan Kirste argues that it is the principle of human dignity, not the principle of equality, which is a “reason for acknowledging all human

2 Subordinate subjects

The first Brazilian Constitution of 1824 (in force until 1891) presented a roll of civil and political rights of Brazilian citizens in article 179. In item XIII, it stated that “[t]he law will be equal to all, whether it protects or punishes, and will compensate each one in the proportion of their merits.” The Constitution made no express reference to slavery, legally abolished in 1888. The constitutional protection of the right to private property, however, was used to assure slave ownership. Slavery was indirectly implied in the rules that defined citizenship and political rights. Article 6, I stated that Brazilian citizens are “those born in Brazil, whether free-born or freedmen, even if of a foreign father, as long as he was not in service of a foreign nation”. Freedmen, considered as Brazilian citizens for censitary suffrage purposes, could vote in primary elections (Articles 91 and 94). The distinction between free-born and freedman (who was born a slave, or had been enslaved) revealed the marks that a slave-holding society had left on a so-called liberal Constitution.

The meanings of equality and its relation to special regimes were the object of a variety of discourses. This is the case of José Maria Avellar Brotero (1798–1873), first professor of natural law in the law school founded in São Paulo in 1827.¹²

All men are controlled by physical laws of nature, composed of the same substances, have the same faculties and are bound to natural law. But the elements they are constituted of (water, fire, air, and earth) are not equally distributed – a condition that engenders a variety of dispositions. The equilibrium among elements varies from person to person. No man is completely equal to another. The disparity “arising from the many colours that shape the human races” is noticeable (§ 94). Equality is understood as a “mutual dependence and reciprocity of obligations among men” (§ 96). Brotero’s conclusions, at this point, are extensively based upon the essay by William Laurence Brown (1755–1830), in the French translation by Denis-François Donnat.¹³ For Brown, equality – properly understood – is

beings as persons in law”. In effect, the Federal Constitution of 1988 gave centrality to the principle of human dignity (art. 1, III). To enter this normative discussion lies outside my objectives.

12 BROTERO (1829).

13 BROWN (1793); DONNAT (1799).

not the same as a levelling, which leads to anarchy and despotism; equality and dependence are not incompatible.

Moving from natural law to the legal reflection of national law, the classifications of Justinian law and *ius commune*, by means of multiple filterings and textual mediation, new questions took centre-stage in the discussion. This was the case when it came to distinguishing between *persona / res / actio* and the different statuses. By the middle of the 19th century, other forms of systematization challenged the Roman tripartition and another semantics took place – subjective rights and capacities – as a reference to the legal personality. I will present some examples.

Paschoal José de Mello Freire dos Reis (1738–1798) was the first professor of national law in the University of Coimbra. His work, “*Institutiones Iuris Civilis Lusitani, cum Publici tum Privati*” (Lisbon, 1789/1793), is divided as follows: Book 1 is devoted to public law; the following books are devoted to private law, organized in the “Justinian way”. Hence, Book 2 refers to persons, Book 3 to things, and Book 4 to actions.

Book 2, “*De Jure Personarum*”, is organized according to different qualities related to freedom, citizenship and family. Such differentiation, which Mello Freire borrows from previous literature, will have a prodigious presence in the 19th century, among Brazilian jurists of the Empire.¹⁴

Based on the tripartition of status, Mello Freire distributes and presents a plethora of differentiations:

- As for the rights related to freedom, the main divide is between free men and slaves;
- The second division refers to citizenship: citizens vs foreigners; citizens by birth or by domicile. There are different orders of citizens: patrician, equestrian and plebeian;
- As for the family, some hold positions as *pater familias*, while others are *filius familias*; some are mothers and others, daughters. Children are born in wedlock, or legitimized, or adopted. These are the legal ways of acquiring

14 In the commentaries of Mello Freire, the influential Portuguese lay jurist, Manuel Almeida de Souza Lobão (1744–1817), defines a “person” – in the legal sense – “as the man as considered in a certain state”. And status means “a certain quality of man, and according to such quality he is entitled to certain rights in regard to other men”, Boehmer, ad Jus ff. Liv. I. Tit. 5, n.I., (LOBÃO, 1818), 5. Lobão makes reference to Justus Henning Böhmmer, *Introductio in ius digestorum*. For an introductory and insightful discussion, see HESPAÑA (1995).

ing authority (*patria potestas*) in the family. The authority of the husband over his wife – by consent or by force of the natural law – relates to her person and her property.

Lourenço Trigo de Loureiro, professor of law at the Recife Law School, based his work, “Institutions of Brazilian Civil Law [Instituições de Direito Civil Brasileiro]”, on Mello Freire – with due modifications.¹⁵

- Rights related to freedom follow the main division among free-born men, freedmen and slaves. Slaves are born as such or become enslaved. They are born of servile status if their mother is a slave (*partus sequitur ventrem*), or they become so as an effect of *ius gentium* (as is the case of war prisoners) or *ius civile*. By the time he writes, Lourenço Trigo de Loureiro advocates that, in Brazil, there should only be slaves by birth and no enslaved persons.
- The second division is between Brazilian citizens and foreigners. Either citizens are citizens by birth or they acquire this status by manumission, domicile or naturalization. Brazilian citizens are entitled to political rights (“not every citizen is entitled to the same sort of political right, but only those who possess the necessary qualities to the fulfilment of those rights in accordance with the common good”). Loureiro excludes from this classification the categories of noblemen, knights and commoners, since they do not correspond to the inequalities admitted in the Constitution (art. 179, 13–16).
- The following division is between those who are *sui juris* (father and mother of the family) and those who are *alieni juris* (persons under the authority of the family). Loureiro highlights the fact that words such as fathers, mothers, sons and daughters express natural conditions. On the other hand, terms such as *pater familias* and *filius familias* denote a civil relationship of authority and subjection. Family defines an unequal society, where each person is subject to parental or marital authority.

I do not intend to analyze each status and its corresponding distinction. It is enough to remark that the three statuses of freedom, citizenship and family cover a wide range of differentiations and modes of subordination.¹⁶

15 LOUREIRO (1851).

16 For a wide-ranging discussion about the status of slaves, see DIAS PAES (2019).

The status categories also play a role in order to organize key areas of the procedural law.¹⁷ Actions are used to defend or claim a status (§ 3):

- Freedom-status actions can be classified as follows: freedom-status actions in general (§ 23), actions of maintenance of the freedom status (§ 24), actions to secure freedom by indemnity (§ 25), freedom-status actions brought by the Emancipation Fund (§ 26), and actions of re-enslavement (§ 27).
- Citizenship-status actions comprise actions of justification of nationality (§ 46) and actions of justification of nobility (§ 47).
- Family-status actions are divided into: parental actions (§ 56), possession in the womb (§ 57), divorce (§ 58), nullity of marriage in general (§ 59), nullity of marriages of non-Catholics (§ 60), spousals (§ 61), and marriage licences (§ 62).

The Course in Brazilian Civil Law [Curso de Direito Civil] by Antonio Ribas (1818–1890), lecturer at the Law School in São Paulo, presents a completely different universe.¹⁸ The General Part of the Course includes the following sections: [I] Rights and their general elements, [II] Persons, [III] Things, and [IV] Legal acts.

The first section is structured around this premise: “Freedom is the essence of man. A right is freedom circumscribed by law.” On the one hand, the status classification is presented, due to its historical relevance, as a review of its development in Roman law, but, on the other hand, this approach undermines the power of justification of subject differentiations. A person is a subject capable of exercising rights. Persons are provided by nature with rationality and freedom – ‘persons’ meaning men. The law may provide this capability to other persons or divest them of their natural personality (in the case of slaves, for instance).

The author of the first project of Civil Code (1864), Augusto Teixeira de Freitas (1816–1883), starts from the broader metaphysical notion of “entity”.¹⁹ Persons are entities provided with the ability to acquire rights. These persons may have a visible existence or an ideal one. Even the slave is a

17 CORREA TELLES (1880).

18 RIBAS (1880).

19 FREITAS (1864) art. 16 ss.

person, since he or she may acquire rights, albeit under countless restrictions. The distinction between legal and *de facto* capacity enables a differentiation among persons to be made: “For us, personal status, in a broad sense, means any situation, considered by this Code as classes, in order to establish a prohibition, and to state capacities and incapacities.”²⁰ The concept of capacity does not require status-based differentiations. Freitas is polemical towards “so many useless classifications of persons in Civil Law Codes ... I run from the word status.”²¹

The first Brazilian Civil Code, in force as of 1st January 1917, adopts the following differentiation: General Part and Special Part. The General Part is composed of Book I – Persons; Book II – Things; and Book III – Legal facts. The Special Part is composed of Book I – Family Law; Book II – Property Law; Book III – Law of Obligations; and Book IV – Succession Law. Projects presented as early as 1889 already used the same categorization, derived from the German legal literature and used in the Civil Codes of Germany, Japan and Switzerland.²²

The Civil Code consolidates a new semantics: persons as legal subjects, personality, legal and *de facto* capacities, and degrees of capacity (absolute or relative capacity).

The author of the approved project, Clovis Bevilacqua (1859–1944),²³ professor at the Law School of Recife, comments that the status theory lost its previous importance. In his handbook, the concept of status is still used in the context of nationals and foreign persons, the family (married/single, relatives, age-related: minors and adults), competence and gender. However, the use of status categories becomes residual, and no longer plays an effective role to organize hierarchies and differentiations.

The categories of person and personality acquire an inclusive aspect in the Civil Code. Following the abolition of slavery, every human being is a person. Legal personality is the ability – as recognized by the law – to exercise rights and make binding amendments to their duties and obligations, as assigned to natural persons and to business entities and properties under certain conditions.

20 FREITAS (1864) art. 26.

21 FREITAS (1864) art. 26.

22 MERÊA (1917) xii; PONTES DE MIRANDA (1981) 98.

23 BEVILAQUA (1908).

Next to the inclusiveness of personality, the Civil Code establishes certain degrees and differentiations by employing the distinction between legal and *de facto* capacity. Whoever is provided with personality is therefore provided with legal personality. But natural persons are classified in different degrees of *de facto* capacity.

In fact, Article 5 defines those natural persons who are fully incapable of fulfilling civil acts by themselves: minors (under 16), insane individuals of all kinds, the deaf and unable to speak who are not able to express their own will, and individuals declared dead *in absentia*. Article 6 defines the natural persons who have a limited capacity: persons aged 16–21, married women, prodigal persons and Amerindians.

The concept of *de facto* capacity enables several differentiations among subjects. Modes of subordination of incapable persons are exercised by means of guardianship and representation. Equality (as they are all persons) is combined with differentiations and subordinations. The concept of capacity allows pre-understandings, which justify differentiations to make them operative in law. The restricted capacity of the married woman was justified in the debates about the Civil Code in the House of Representatives in these terms:

“No one ignores the fact that the psychological constitutions of men and women are remarkably different; such differences do not enable us to declare that a man is superior to a woman; they simply allow us to affirm that men and women perform different functions in society and the family. Whenever a more intense intellectual, moral and physical energy is required, then, a man is more suitable than a woman; on the other hand, whenever a larger amount of dedication, persistence and emotional development is required, a man can certainly not surpass his spouse.”²⁴

Bevilaqua, an advocate of the full legal capacity of the married woman, summarizes the rationality of such distinction, as introduced in the Civil Code: “The reason for the restriction imposed to the capacity of the married woman does not derive from mental disadvantages, but from the different functions each of the spouses are required to perform.”²⁵

The restricted capacity of the married woman was repealed only by Law 4.121 from 27th August 1962, known as the Statute of the Married Women,

24 Projeto do Código Civil Brasileiro (1902) 113.

25 Projeto do Código Civil Brasileiro (1902) 113.

which changed many articles of the Civil Code and the Code of Civil Procedure.

Emblematic of this section, I reproduce a copy of a watercolour painted by French artist Jean-Baptiste Debret (1768–1848), who travelled to Brazil in March 1816 as part of a mission tasked with the establishment of a Beaux-Arts School in Rio de Janeiro. According to Debret's notes, we are able to identify the individuals he represented: "Following old habit, still in force amidst this class, the head of the family walks in front of his family, followed by his children, lined by age, starting from the younger."²⁶ The man is a government official. Then come the daughters, and the pregnant wife. After them comes the chambermaid: a mixed-race woman, clearly distinguished from the other slaves by the nature of her service. Then follow the other slaves, all barefoot, and the last one is a new acquisition. Debret depicts an exemplary father, head of a family, a citizen and a free man – all the other individuals are subject to his authority, both parental and marital, as well as to his ownership.



Figure 1: J.B. Debret, a government official, c. 1820–1825.

26 LAGO (2008) 169.

3 Disciplined subjects

The Juvenile Code of 1927 is highly representative of another regime of legal subjectivity built outside the semantic patterns of ‘status’ and ‘civil capacity’. The problem of ‘social defence’ – how to prevent criminality and fight begging and vagrancy – as well as the ‘social question’ – how to regulate work beyond the framework of the civil law contract – match one another to form a specific regulation of abandoned and delinquent juveniles.²⁷

From 1870, we can identify a widespread literature that merges criminology, the ‘new criminal school’, positivism and other scientific theories.²⁸ Legal scholarship combines with medical scholarship to offer the concepts of the normal subject and the abnormal (criminal) subject.²⁹ Such knowledge points the way to the development of preventive policies formulated in subject classifications, introducing disciplinary and educational regimes in special imprisonment facilities (penitentiaries, correctional colonies, etc.). The judge performs a role of supervision of a mixture of knowledge and practice, aimed at the reformation of abnormal individuals. These ideas and practices go beyond the criminal field. This mixture of legal, medical, sanitary, and psychiatric knowledge justified the existence of a separate legal regime applicable to sections of the population in order to prevent disorder, normalize, moralize and provide assistance. The establishment of a ‘new urban order’ demanded the social control of multiple segments of the population: prostitutes, workers’ movements’ leaders and juvenile delinquents. The criminal question, the social-defence question, and the social question are treated jointly.

The Juvenile Code of 1927 is the result of wide-ranging debates and policies which had involved jurists, physicians and educators since the turn of the century. In the first quarter of the 20th century, we see the creation of government-funded shelters, professional training schools, and reform institutions. Until that time, secular and religious charitable associations – supported by private donations – had been in charge of the care of sick people in general, the mentally impaired, the blind, the deaf and unable to speak, as well as of abandoned children. Laws of assistance and protection modified

27 ALVAREZ (2003).

28 DIAS (2017).

29 ALVAREZ (2003) 150–151.

the very sense of “assistance”, defined as part of the State’s duty of social care, as they branched off into prevention, coercion and repression.

The juvenile question became emblematic of new conceptions of assistance and the maintenance of order in society. João Cândido de Albuquerque Mello Mattos, first Juvenile Court judge in Rio de Janeiro, and author of the Juvenile Code project, declared that the State, “in view of the maintenance of social order, and because of human solidarity, is required to intervene in a preventive and corrective manner, in order to protect and rehabilitate these juveniles, future active citizens, who will take part in the public life of the Nation”.³⁰

The Code has an ambitious scope, imposing regulations from the moment the baby is born onwards. There is thorough regulation for different categories of abandoned children and juvenile delinquents. The Code sets out rules regarding the internment in institutions or the placement in foster care of children of unknown parents, of “maritally abandoned children” (children who are born of known parents, and later abandoned), and of “morally abandoned children” (children who live with their family or legal guardians but are vulnerable to abuse, ill treatment, and harsh punishments, or living with inappropriate role models and will, therefore, likely turn into vagrants, beggars, libertines and criminals).³¹ The Code also provides specific rules for the removal of parental rights; the conditions for supervised freedom; and, also, the sheltering and internment of minors in hospitals, asylums and institutions. As for juvenile delinquents, the Code establishes different degrees of criminal responsibility; it defines specific procedures in a separate jurisdiction. By defining the concept of social danger and abuse, the Code also regulates the work regime of minors, banning them from “immoral” and “hazardous” occupations.³²

The Juvenile Code of 1979 and the National Policy of Minor Welfare, both implemented during the Dictatorship, maintained the special regime for minors – a doctrine known as “minors in irregular situation”.

Emblematic of these developments, we show photos (figures 2–4) of juvenile inmates interned in the Correctional Institute of São Paulo [Insti-

30 MINEIRO (1929) iv.

31 With the concept of “moral abandonment”, the Juvenile Code enlarges the concept of “abandonment” contained in the Civil Code and spells out a special framework for it.

32 Another example of the wide-ranging nature of the Code is the fact that it allowed the judges to restrict children’s and young people’s access to the cinema and theatre.

tuto Disciplinar de São Paulo], founded in 1900 and supported by the State.³³

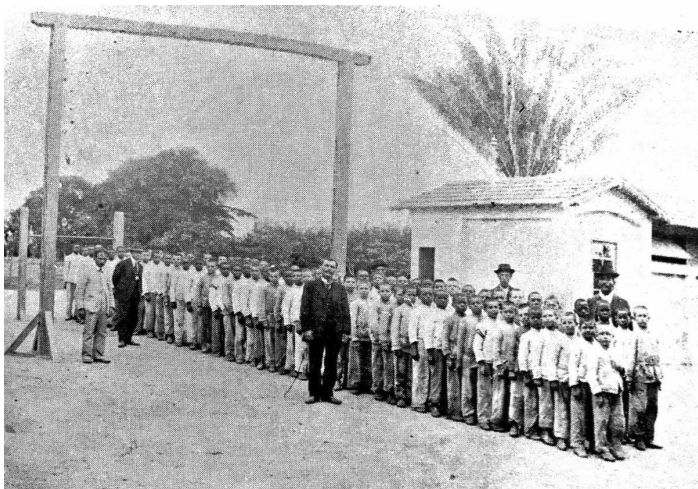


Figure 2: gymnastics

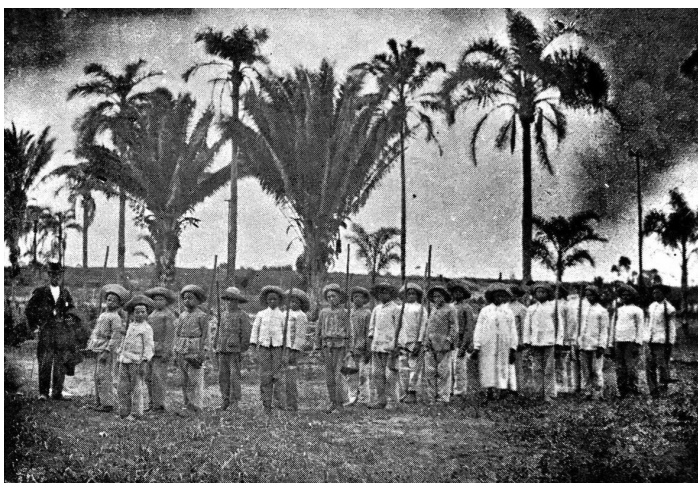


Figure 3: leaving for work

33 Motta (1909).

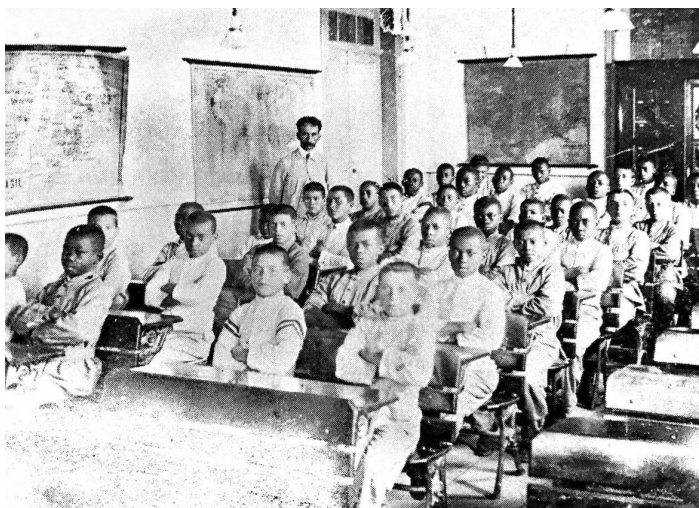


Figure 4: a classroom

4 Assimilated subjects

The special regime applicable to Amerindian populations dated back to colonial times. By the end of the 18th century, Amerindians were made equal in status to minors (law of 1798).³⁴ By the 1830s, the status of Amerindians was equal to that of orphans. I will focus here on the legislation of the Republic (20th century).³⁵

In the first decade of the 20th century, the construction of the railways and territorial expansion by Europeans in the southern and south-eastern regions faced resistance from indigenous peoples such as the Xoclengues in Paraná and Santa Catarina and the Kaigangs in São Paulo. In 1908, on the occasion of the 16th Congress of Americanists, Brazil was accused of massacring indigenous people in the country.

In this context, in 1910, the Service for the Protection of Indians and the Placement of National Workers (Serviço de Proteção aos Índios e Localização de Trabalhadores Nacionais [SPILTN]) was created, and it was placed

34 PERRONE-MOISÉS (1992).

35 For a synthesis, see MELATTI (2014).

under the authority of the Ministry of Agriculture, Industry and Commerce. The department was responsible for two governmental policies: to assimilate the Amerindians into “civilized society” and to promote the settlement of poor rural workers in Agricultural Colonies. By the end of the decade, these two policies were set apart and the Service for the Protection of Indians (or SPI) was restricted to the fulfilment of the first task.³⁶

Pursuant to the Civil Code of 1917, Amerindians are classified as persons with limited capacity, as mentioned above. The Code stated that “the Indians will be subject to guardianship, according to a special body of laws and regulations, a condition that will be removed once they adapt to civilization”. Thus, the indigenous condition was seen as transitional; it would prevail only for as long as Amerindians were not assimilated. The Code, as well as specific legislation enacted to support the assignment of the SPI, were highly influenced by the ideals of Positivism, which considered such protection as a means to the progressive evolution of indigenous people.

Decree 5.484 of 1928 granted the legal guardianship of Amerindians to the State. Amerindians were classified according to the civilizational level they were deemed to have attained. For each group, the decree defined specific rules for civil registration, marriages, and deaths; in relation to criminal law; and, finally, regarding the occupation of the land. The policy on Amerindians introduced by the SPI guaranteed that indigenous populations were allowed to live according to their traditions; it promoted the demarcation and protection of their own territory; it guaranteed citizen’s rights in conformity with their stage of civilizational advancement, as the legislator saw it at the time. At the same time, policies were implemented supporting secular education, professional training, as well as the introduction of tools and better agricultural practices. The core aim of the policy on Amerindians was their integration and assimilation into Brazil’s European civilization.

In 1890, the Positivist Apostolate of Brazil presented to the Constituent Assembly a proposal to divide the Republic of the United States of Brazil in two: on the one hand, the “Brazilian Western States systematically federated, deriving from the merger of European, African and Aboriginal elements” and, on the other, the “Brazilian American States empirically configured,

36 LIMA (1992).

constituted of savage hordes, sparse in the territory of the Republic". Both territories would have their autonomy acknowledged. The Federal Government would mediate between the two units, ensuring that their respective territories could not be crossed into without prior consent.³⁷ The endeavour of the Positivists, which recognized indigenous sovereignty, did not succeed. According to Brazilian law, Amerindians do not constitute a nation in the legal sense, since they do not relate to the State by treaties, as other countries do. Amerindians have the *possession* of the land where their communities are settled, but the State has the *property* of such lands.³⁸

Due to corruption scandals and irregularities in its functioning, the SPI was replaced in 1967 by the Indian National Foundation [Fundação Nacional do Índio – FUNAI], created during the Dictatorship (1964–1985). In 1973, the Indian Statute was promulgated, establishing a legal framework regarding the situation of Amerindians under the law, aiming at “preserving the [indigenous] culture and integrating them, in a progressive and harmonious way, into the national community”. Amerindians who are “not integrated into the national community” remain under the authority of FUNAI. This preservation policy followed the ILO Convention 107, incorporated into Brazilian Law in 1966. The Convention 169 of 1989 represented a shift in this paradigm and was to exert influence on the regime introduced by the Constitution of 1988, as we will see below.

In 1975, Mauricio Rangel Reis, in charge of the Interior Ministry, announced a government plan intended to accelerate the integration of indigenous populations and to promote their emancipation. In the following years, the government presented a bill to remove the provisions regarding the legal guardianship of indigenous communities. After a strong reaction from anthropologists, missionaries and the press, the government gave up. The end of guardianship was denounced as terminating the special protective system provided for in the indigenous-specific legislation, and as leading to the allocation of land for development projects (emancipated Amerindians would be removed from their traditional lands). The case is meaningful as the positive re-affirmation of legal guardianship, as a means of protection of the indigenous peoples.³⁹

37 LEMOS/MENDES (1890).

38 CUNHA (1987).

39 Comissão Pró-Índio (1979).

Emblematic of this development is a video (https://www.youtube.com/watch?v=kWMHiwdbM_Q) featuring indigenous leader Ailton Krenak, in 1987, at the time of the Constituent Assembly (1987–1988). During his speech, he painted his face black as a sign of mourning, in light of the way that the Assembly addressed the indigenous question. This performance, beside a huge mobilization on the part of indigenous groups, was crucial to the change of direction of the Constituent Assembly's plans and, ultimately, to the approval of Articles 231 and 232 of the Federal Constitution. The chapter on indigenous rights was a turning point against assimilationist views towards these peoples.



Figure 5: Ailton Krenak, 1987

5 Citizen-constitution

The Constitution of 1988, called the “Citizen-Constitution”, is the final stage in our analysis because it embodies a relevant inflection, as it aims at putting an end to long-term structures of exclusion in the country's history.

The Constituent Assembly was established a year before (01.02.1987). Compared to previous experiences, this process was rather singular, as it

was widely open to the participation of civil society in commissions, hearings and debates.⁴⁰ The Assembly was receptive to the requirements of social movements (black people, indigenous peoples, and women), which had gathered and co-ordinated their actions since the Dictatorship. These movements made a major contribution, as they gave a voice to international declarations and conventions, which left a distinguishing mark on the final text of the Constitution.

One of the fundamental principles of the Republic is to “to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination”. (Article 3, IV). Combined with other principles and rules, such as the equality before the law (Article 5, *caput*) as well as the express determination that “men and women have equal rights and duties under the terms of this Constitution” (Article 5, I), struggles for the recognition of minorities and specific groups won constitutional support. Affirmative action to grant full access to universities, specific laws against gender and race discrimination, and provisions on reproductive rights and same-sex marriage are among the main themes at the heart of public debate in the last few decades.

As for children and young people, the Constitution overturned the previous regime based on the doctrine of “minors in irregular situation”. Such regime was aimed at a specific social group of deprived children and young people, either abandoned minors, or offenders and misfits. It aimed at imposing social control and discipline. The new Constitution introduced the “integral protection” doctrine, destined for all children and young people. The Child and Young People Act of 1990, aligned with international conventions, created a special regime intended to replace “control” and “discipline” with the principle of the “social development” of this group. In the spirit of this normative landmark, the new Civil Code of 2002 no longer employs the expression “parental authority”: instead, it prefers the term “family authority”, in accordance with this new normative constitutional regime. Another change is noticeable in regard to long-term affiliation differentiations (children born to parents who are legally married, children born out of wedlock, and children by adoption), and relevant rights were abolished by the Constitution.

40 PILATTI (2008).

This was the first Constitution to dedicate a special chapter to indigenous peoples. The core of the constitutional pact is to guarantee the physical existence and cultural reproduction of indigenous peoples in perpetuity. Amerindians are entitled to the right to a future made up of a traditional way of life. With this in mind, the Constitution acknowledges the Amerindians' original rights over their traditionally occupied lands, and the Union is responsible for demarcating them. Traditionally occupied lands remain in permanent possession of indigenous peoples, who are entitled to their exclusive usufruct, independently of the imposition of national development projects. The constitutional framework requires the full recognition of a traditional way of life, with its own social organization, customs, languages, beliefs and traditions. After 1988, the number of ethnogenesis processes, i.e. self-identification as an Amerindian, increased greatly, in a movement directed at reverting the assimilation promoted by the State. The latest decennial census (2010) collected data on 896,917 indigenous individuals, on c.255 peoples, and on speakers of more than 150 different languages.⁴¹ The Constitution also recognizes the right to a future for other traditional groups such as the *quilombolas* (descendants of former slaves, who live in communities with distinctive cultural practices).

Beside the special principles and provisions applicable to the law, the Constitution has also instigated universal policies, such as the Unified Health System [Sistema Único de Saúde] and the Social Security and Social Assistance systems. As far as political rights are concerned, an old provision from 1881 has been repealed, which banned illiterate persons from voting.

6 Final remarks

The project of the “invention of equality”, as Pierre Rosanvallon⁴² named it, which took place in European and North-American countries at the end of the 18th century, established three different meanings for equality: the rejection of privileges; independence from forms of subordination; and citizenship (defined as the participation in a community of persons with rights). In Brazil, the invention of equality combined with the reinvention of patterns of differentiation of persons. The creation of special regimes for groups of

41 See https://pib.socioambiental.org/pt/P%C3%A1gina_principal.

42 ROSANVALLON (2011).

persons continued in the 19th and 20th centuries. Equality before the law and differential legal regimes combine in a variety of ways during the time span considered in this research.

Whatever the results may have been, I have meant to emphasize how such a variety of differentiating categories of groups and subjects were employed and invented through regulation and jurisdiction. Some of these categories belonged to the revered European legal tradition, which was translated into local conditions. Strata of a long-standing semantics remain and merge with another semantics, derived from the patterns of liberalism and constitutionalism. Citizenship does not replace status, rather, it is a type of status subject to limitations. The rhetoric of liberties, rights and categories, embodied in universalization pretensions (such as the concept of “person”), matches old and new hierarchies, which are re-signified and rearranged by discourses and practices. Difference markers (race, gender, and ethnicity) and mechanisms of subordination, control and discipline (such as guardianship and imprisonment) are set in motion for the definition of boundaries and belonging to groups.

From a conceptual perspective, we may say that ‘equality’ – or the notion of the ‘equal’ – are incomplete predicates, which raise the following question: ‘equality’ and ‘equal’ in which way? Equality is not the same as identity (equality in every aspect). The invention of equality was a project devised to justify relevant aspects for the determination of the belonging to a group of equal entities (subjects).⁴³ However, I would also like to emphasize what the relevant issues (difference markers) are, which justify differential regimes.

If it is true that equality can be expressed in many ways, as Rosanvallon indicated, then, the same can be said in regard to the differentiation of persons. The masks point towards multifarious logical operations, which are at stake in the process.

43 GOSEPATH (2011).

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Appendix

- 1824 Constitution of the Empire of Brazil (first constitution granted by Emperor Pedro I)
- 1888 Law 3.353: Slavery Abolition Act
- 1910 Decree 8.072: Protection of Indians and Placement of National Workers Service [Serviço de Proteção aos Índios e Localização de Trabalhadores Nacionais (SPILTN)], since 1918 referred to only as Protection of Indians Service
- 1916 Civil Code
- 1927 Decree 17.943: Juvenile Code (also: Mello Mattos Code)
- 1928 Decree 5.484: Regulates the situation of Amerindians in the national territory
- 1943 Decree-Law 5.452: Consolidation of Labour Laws
- 1962 Law 4.121: Statute of the Married Woman
- 1967 Law 5.371: Creates the National Indian Foundation
- 1966 Decree 58.824: Incorporates the ILO Convention 107 of 1959 into national law, “Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries”
- 1973 Law 5.889: Statute of Agricultural Workers
- 1973 Law 6.001: Indian Statute
- 1979 Law 6.667: Juvenile Code
- 1988 Federal Constitution (in force)
- 1999 Law 8.069: Child and Young People Statute
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- 2004 Decree 5501: Incorporates the ILO Convention 169 into national law

The Theory and Ethics of the Person in Law: The German Perspective

1 Introduction

Law has indeed become the great equalizer and diversity is legally provided within a framework of general equality, as Samuel Barbosa rightly claims. The factual social status is no longer the foundation of law and individual rights – or rather: privileges – the basis of legal dignity, but the other way around: dignity has become the foundation of human and fundamental rights that are the basis of personhood in law. Distinctions in this legal status, therefore, need justification. This becomes more complicated if we do not consider both individual and group rights because here not only the legal relationship of the group towards the state but also between the members of the groups and the group itself have to be regarded to decide about the diversity *of* the group and diversity *within* the group.¹ Since Georg Wilhelm Friedrich Hegel, we know that not all contradictions are paradoxical, but necessary for all existing entities as long as we can understand the dialectic of seemingly opposing elements of a relation.² In this sense, I should not call the legal relation of equality and diversity of persons paradoxical, but dialectical.

In his article, Samuel Barbosa describes the institute of legal personhood in Brazilian legal history and the entities to which this status is attributed. In the analytical part of his paper, he focusses on the institute of legal personhood. I have previously called such an analysis “The *Theory* of Legal Personhood”.³ In the shorter final parts of his paper, Barbosa claims that equality calls for the attribution of legal personhood to all human beings alike. I should call this an argument in *legal ethics*. Whereas I mostly agree with the first part of the paper, I claim that it is not equality, but rather human dignity which is the reason for acknowledging all human beings as persons in the

1 KIRSTE (2016) 27 ff.

2 HEGEL (1992/1813) 50 ff.

3 KIRSTE (2015a) 345 ff.

law.⁴ Since apart from the theory of jurisprudence, legal theory and legal ethics are the part-disciplines of legal philosophy,⁵ my perspective on Samuel Barbosa's paper is philosophical.

2 The theory of the legal person: What is a legal person?

Firstly, I should like to distinguish between the concept of legal personhood and that of legal personality and focus on the former. Whereas legal personhood signifies the unity of rights attributed to a legal subject, personality is protected by a particular group of rights, namely those referring to reasonable persons on behalf of the development of their character and abilities⁶ (in Germany Art. 2 in connection with Art. 1 Basic Law).⁷ Both are founded on the capability of a human being to have rights and duties, which could be called legal subjectivity. Legal persons are legal subjects with respect to the rights attributed to these subjects.⁸ Based on the Brazilian legal order, Barbosa may not need to make these distinctions; in the philosophical perspective taken here, they seem to be relevant to me.

Legal subjectivity and legal personality then relate to each other like the potentiality of rights and actually having rights. Distinguishing a legal subject as a subject being capable of having rights and the legal person as a unity of the rights attributed to a legal subject, it is possible to understand, why legal subjects can have different kinds of rights.

Citizenship could be defined as the public status of a legal person.⁹ It encompasses the political rights attributed to a legal subject. At the core of citizenship are the rights to participation in political autonomy, namely the rights to vote and to be elected. However, in a broader sense, one could also

4 KIRSTE (2013a) 63 ff.

5 KIRSTE (2019) 25–37; KIRSTE (2020) 15–29.

6 Actually to claim “personality” would be necessary to have human rights, has often been a white supremacist attempt to avoid acknowledging these rights to human beings of other cultures, TIEDEMANN (2012) 12.

7 However, in the history of philosophy, sometimes the concept of person refers to rational capabilities, like in Locke's concept of person. Since the classical period in literature (Schiller) and the idealist philosophies, at least in Germany, these rational abilities are expressed in the term “personality”.

8 Kurki defines “that legal personhood is a bundle property and that one can hold legal rights without being a legal person”, KURKI (2020) 4.

9 For different conceptions of citizenship see EICHENHOFER (2020) 1.

consider the rights to political communication and association, which are limited to citizens. Given the limited category of rights, it is possible – though not sufficient for a fully respected human being – to be acknowledged as a legal subject and person, without being considered as a citizen, because he has no or not all political rights.¹⁰

To distinguish these different forms of legal personhood with respect to the rights attributed to legal subjects, it is helpful to refer to Georg Jellinek and his well-known status theory.¹¹ However, we must make three caveats:¹² Firstly, since Jellinek developed his theory of the four legal status in a constitutional monarchy, it is necessary to reinterpret it with respect to democracy under the rule of law. This especially applies to the status subjectionis and the status activus. Secondly, it can be presupposed that in such a legal system, the status is an expression of the rights attributed to a legal subject and not the rights of a subject as a result of his social status, as Barbosa correctly shows with respect to slaves and indigenous people in 19th-century Brazil.¹³ Thirdly, Jellinek developed his theory for fundamental public rights. Since we are dealing with legal subjectivity in general here, it is necessary to enlarge this concept to all kinds of rights. For Jellinek, the first status encompasses all rights of an individual against other legal persons (namely the state). Privacy, freedom of speech or of opinion and, the right to property protect the freedom of the individual from other legal persons and the state as a legal person. This is the status *negativus*. Today, to be left alone should in many respects not suffice. Labour laws, consumer protection laws, claims to public aid especially public health is necessary for the individual to fill this free space. Jellinek called the unity of these claims to public subsidies and the fulfilment of duties of others the status *positivus*. A third status was described by him as a status of duties towards the state and called this status *activus* as securing freedom in the state.¹⁴ In a democracy under the rule of law, however, this status is transformed into the freedom of the individual to participate in the enactment, interpretation and enforcement of his rights and duties and the common good. It now becomes clear that

10 KIRSTE (2015c) 28 f.

11 JELLINEK (1905) 86 f., 94 ff.; BRUGGER (2013) 237 ff.

12 KIRSTE (2014b) 177 ff.

13 See below under 2.

14 KIRSTE (2008) 187 ff.

citizens need to have all rights necessary for active status. Finally, Jellinek required a fourth state, which means the subjection of the individual under the state. Now, since the rule of law means that the state is founded on and limited by law, the state itself is to be conceptualized as a (public) legal person, a subject of his competencies and duties. The status *subjectionis* means the subjection of all persons – private or public – under the law. In this status, persons have legal relationships and are not merely subjected to the power of another person.

Accordingly, whoever is legally capable of having rights, is a legal subject. Legal persons, based on the status *subjectionis*, can have a negative status against other persons, a positive status of claim rights towards persons and, an active status in the participation of private and public autonomy in founding, interpreting and, enforcing rights and duties with other persons. Together these rights and forms of legal personhood form the legal relationships of persons in the law.

3 The ethics of the legal person: Who should be a legal person?

Now this analysis of the concepts of legal subjectivity, legal personhood, legal personality and, citizenship based on the distinction of the four status, the status *subjectionis*, *negativus*, *positivus* and, *activus*, does not tell us, *who* should be acknowledged as a legal person and what rights this person should have. Natural justifications from human capabilities like reason, empathy, ability to act, neediness are not sufficient normative grounds. In the introduction and the last section of his paper, Samuel Barbosa claims that this question could be answered based on the principle of equality. We would treat humans unequally if we did not acknowledge their personhood. Equality, however, is a principle that refers to an external criterion by which we should treat people equally or unequally. We have to ask: equality of whom, of what and what is the justification of treating human beings in some respects equally.

Instead of equality, one could argue that autonomy is the foundation of legal personhood: I may refuse to conclude a contract with someone if I am not legally obliged to do so. I am protected by my private autonomy to do so. However, if I want to be left alone by someone else, obtain something from him or undertake something together with him, in a way that is legally recognized, I cannot proceed without his voluntary commitment or legal

obligation to do so.¹⁵ This is his freedom and his right. Concluding a contract, in which he and I mutually bind ourselves means however that we recognize each other as legal subjects, capable of having rights and duties. In private relationships, there are no rights and duties, if the parties do not recognize each other as legal persons. The master, who just uses a slave does not recognize him as a legal subject but treats him as an object. He has no rights against the slave and the slave does not have a duty towards his master. Their relationship is factual. Marx would speak of the ultimate alienation or objectification of a human being. This demonstrates that freedom may answer the question of equality of what – equality of autonomy – and also of who should be recognized as a legal person. But what about people who do not have legal autonomy such as slaves, or who cannot act autonomously, such as disabled people? Shouldn't they be acknowledged as persons also?

In order to answer this question, let us take a quick look at the history of legal theory in the 19th and early 20th centuries in German-speaking countries. It is noteworthy that the theory of the legal person in Germany, after philosophical and jurisprudential preliminary work, developed in the 19th century mainly under legal positivist auspices. The moral question of who should be a person – namely the human being – was taken for granted.¹⁶ In light of National Socialism's disregard for the personality of the human being, this was too short a thought and challenges the legal-ethical question of the right to recognition as a legal entity.

The General Prussian Land Law of 1794 formulated in § 1 of part one "Of Persons and their Rights in General": "Man, as far as he enjoys certain rights in civil society, is called a person." While this provision correctly states that those people who have rights are persons it does not say which people should have rights. It answers the legal-theoretical question about the concept of personhood but does not provide any legal-ethical criteria for who should be a person. In the same sense the law does not grant equal rights to all men, but proceeds from differences of class: "§ 6 Persons, to whom, by virtue of their birth, destiny, or principal occupation, equal rights in civil society are attached, together constitute a state of the empire. Whoever, therefore, has equal rights belongs to a state." The General Prussian Land Law does, however, distinguish "general rights" from those acquired by

15 KIRSTE (2015b) 473 ff.

16 KIRSTE (2001) 319 ff.

virtue of belonging to a state: Under “Sources of law” it states in § 82 of the introduction, “The rights of man arise from his birth, from his status, and from actions or events with which the laws have a certain effect.” Of the “general rights” the Prussian Land Law assumes that they “are based on the natural freedom to seek and promote his own well-being without infringing on the rights of others” (§ 83, Introduction). After all, slavery was abolished.¹⁷ Apart from this, it remains a matter for the legal system to determine the circle of those to whom it wishes to attribute rights. At most, there may be an extra-legal – natural legal obligation – to recognize all human beings as legal subjects. What is problematic about this construction is not that the legal system decides on rights, but that this can be done selectively. The positive, “civil” right to rights is still missing so that certain groups of persons could be excluded from the law.

This step is taken only by the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) of 1811, § 16: “Every human being has innate rights which are obvious through reason, and is, therefore, to be regarded as a person. Slavery or serfdom, and the exercise of power referring to it is not permitted in these countries.” Now the right of a person to be recognized as a legal person is included in the law itself. Even today this provision still contains the protection of human dignity in the Austrian legal system. We cannot go deeper into this here. But it is sufficient to conclude that it needed natural, innate rights to guarantee all human beings the basic status as a person in law. In his commentary Franz Zeiller (1751–1828), the author of § 16 gave the reason for the rights-based personhood.¹⁸ And his academic teacher Karl Anton von Martini (1726–1800) stated in § 137 of his “Positiones”: “The being and nature, which all humans have in common, contains the sufficient reason of the innate rights.”¹⁹ It becomes clear for both that human dignity is the fundament of the innate rights, which are again the basis for the

17 General State Laws for the Prussian States II, 5 § 195: “Slavery shall not be tolerated in the Royal States.” § 197: “No royal subject can and may commit himself to slavery”; I, 4 § 13: “Nobody can be bound to slavery or private captivity by declarations of intent”; II, 7, § 148: “Therefore the former serfdom, as a kind of personal slavery, does not take place, even in consideration of the dependent inhabitants of the flat country.”

18 ZEILLER (1802) § 2, p. 2: “Reasonable beings, as far as they have the ability to set purposes for themselves, and to carry them forward in a freely effective way, and are therefore for their own sake present (end in itself), are called persons [...]. Man necessarily thinks of himself as a free being, as a person.”

19 MARTINI (1772) § 137, p. 29 cf. also § 164, p. 36.

personhood of all human beings qua being humans. The essence of man is his freedom. But the reason and goal of this freedom is his ability to be an end in himself, as Zeiller claims following Immanuel Kant.

“And since, for the distinction of irrational objects or things which are available to rational beings as means, rational beings, which are ends in themselves and possess rights, are called persons; so every man is to be regarded as a person; he must not, like a thing, be used as means for any ends of others. This highly fruitful legal original truth, to which, as the newer systems of natural private law show, all legal truths can be traced back. In the end, is here taken as a basis for the treatment of rights.”²⁰

To be an end in oneself is the explanation Kant gives for the principle of human dignity. Dignity is, therefore, the principle that requires all human beings to be recognized as persons. Because only as persons do they have a status that permits them to be an end in themselves. Whereas von Zeiller was inspired by Immanuel Kant, his academic teacher, Karl Anton von Martini’s concept of the person was influenced by the older enlightened natural law tradition. On this theoretical foundation, however, he too had considered slaves as persons, because they also have innate rights for the fulfilment of the duty to perfect themselves.²¹

The debate on slavery and legal personhood was far from over though. Gustav Hugo (1764–1844), perhaps the most important precursor of the Historical School of Law, decidedly rejected the Kantian idea of the foundation of personhood in the dignity of the human being and even went so far as to consider slavery justifiable:

“In recent times one has often tried [...] to decide from mere terms a priori also about this. The slavery and serfdom of whatever kind it might be, was rejected because in it man would become a thing, a commodity, private property was approved [...] Now every child may decide whether it is more unreasonable to have a serf or to let a man be disgraced (although he will of course soon stop, to be a thing, a something, at least a living something) [...] This right to see a man, to have something carried, in short, to have some advantage from him, can now, like any other property, be acquired and sold, without prejudice to the personality of the bearer.”²²

Although heavily criticized by many members of the Kantian, Hegelian, Krauseian and other philosophical schools for this rationalization of the

20 ZEILLER (1811) 103.

21 MARTINI (1772) § 763, p. 241: “The slave is also a man, therefore all the duties of mankind must be assigned to him. He has inherent perfect rights, therefore he has a moral state, and is a person in this respect.”

22 HUGO (1799) 145 f.

status of slavery, Hugo set the pace for the positivist understanding of persons in law in the 19th century. Most of the scholars participating in the discussion from Savigny to Zitelmann rejected the Kantian concept of an original right (“*Urrecht*”)²³ of all men to be acknowledged as legal persons but instead took it as moral self-evidence that all men and only men should be legal persons, as Friedrich Carl von Savigny (1779–1861) put it.²⁴ Legal personhood for Savigny was the basis for legal relationships.²⁵ Savigny emphasized the autonomy of law in deciding, who may become a legal person and who would not.²⁶ Georg Friedrich Puchta (1798–1846) brought it to the point that “man is person only by law”.²⁷ This autonomy of the legal concept of the person from its philosophical foundation allowed the technical differentiation of this legal institution the further course of the 19th century. Arndt thought that the legal person had “only an intellectual, not a natural existence”, whereas Unger meant, it was “a creation from nothing”. Ernst Zitelmann, with regards to the capacity of will, decidedly did not refer to the natural person, but to “whom the objective law confers such a status of the person”.²⁸ Legal personhood is considered a mere legal technicality. It would be based on the autonomous decision of the positive law to decide about it.

23 KIRSTE (2018a) 97–136.

24 “All right is existent for the sake of the moral freedom inherent in every individual human being [...] Therefore the original concept of a person or legal subject must coincide with the concept of man, and this original identity of both concepts can be expressed in the following formula: Every individual human being, and only the individual human being, has a legal capacity”, SAVIGNY (1840) 2.

25 SAVIGNY (1840) 1: “Every legal relationship consists of the association of one person with another. The first component of it, which requires closer examination, is the nature of persons whose mutual association is capable of forming this legal relationship. So here the question is to be answered: Who can be the bearer or subject of a legal relationship? This question concerns the possible having of rights or legal capacity [...]”

26 SAVIGNY (1840) 2: “However, this original concept of the person can be modified by the positive law in two ways [...], restrictive and expansive. Firstly, some individuals may be denied legal capacity, either wholly or in part. Secondly, it can transfer the legal capacity to anything but the individual human being, i. e. a legal person can be artificially formed.”

27 JOHN (1982/83) 949, points out that this would be the first step for the assumption that man as a being endowed with the power of will is a legal subject, because the individual right is power, and not that the individual right is a power of will, because it serves the realization of the human will.

28 For these quotes see COING (1989) 340 f.

Georg Jellinek viewed legal personhood in a positivist manner as a title granted by the state – which was itself understood as a legal person: “There is, therefore, no natural, but only a legal personality.”²⁹ The criterion of human being, for him, did not seem sufficient to recognize all human beings as persons.³⁰ It could well be, therefore, that some human beings had a mere factual relationship towards each other and the state. Although he rightly claimed that “all legal relationships are relationships between legal subjects”³¹ and that “[t]he recognition of the individual as a person is the basis of all legal relationships”,³² he did not provide a legal criterion for who should be recognized as a person in law. Hans Kelsen has brought this 19th-century development in the theory of the legal person to a provisional conclusion. He eliminated still existing contradictions of previous doctrines by reducing the legal entity to a consistently objective legal basis. His concern was to “bring physical and legal persons [...] to a common denominator, to the common denominator of law”. In this perspective, the natural person will also prove to be an artificial construction and thus appear in its truth as a “juridic person”.³³ Both, the “natural” as well as the “juridic person” are personifications of the rights and duties they have.³⁴

29 JELLINEK (1905) 28.

30 JELLINEK (1905) 82: “The state, therefore, creates the personality. Before the state freed him or recognized him in a limited sense as having the power of disposal over his peculium, the slave was not a person, not even in the sense that he was attached to it as a quality that had not been recognized. He was naturally recognized as a human being. But this was only expressed in the fact that he was not a legal subject, but a subject of duties. From the nature of man, historically and logically, only duty but not rights against the State result as necessary.”

31 JELLINEK (1905) 10: “All law is the relationship of legal subjects [...] The state, too, can only have rights if it is confronted with legal entities. A *de facto* relationship of domination becomes a legal one only when both members: the ruler and the ruled recognize each other as bearers of mutual rights and duties.”

32 JELLINEK (1919) 419.

33 KELSEN (1960) 176 f. distinguishing “natural legal persons” and “juridical legal persons” like joint-stock companies: “If, in the case of the juristic person, rights and legal duties can be carried by something that is not a human being, then, in the case of the so-called natural person too, what ‘carries’ the rights and legal duties and what the natural person must have in common with the juristic one, since both, as ‘carriers’ of rights and legal duties, are persons, cannot be the man who is the carrier in question, but something that man has just as much as the communities addressed as legal persons.”

34 KELSEN (1960) 177.

Most of these legal theorists assumed morally that all human beings can be subjects of rights and therefore persons in the law. Precisely because this was a moral implicitness, there seemed to be no need for its legalization. Morality however can change silently and faster than law. When the enlightened morality that even legal positivists could accept was exchanged by the racial ideology of the National Socialists the moral presupposition that all men are natural legal subjects vanished as well. Through the positivist reduction of the concept of the legal person to a legal-technical institute of the ownership of individual rights, which the state could or could not assign, the ethical question was lost. Now groups of people could again be denied the status of legal persons. The party program of the National Socialist German Workers' Party (NSDAP) of February 24, 1920, already stated in point 4: "Citizens can only be those who are comrades of the people ["*Volksgenosse*", SK]. Comrade of the people can only be one who is of German blood, without regard to denomination. No Jew can, therefore, be a comrade of the people." Karl Larenz (1903–1993) willingly assisted that Jews, therefore, could not be persons in law either:

"Not as an individual, as a human being par excellence, or as the bearer of an abstract, general reason, I have rights and duties and the possibility of shaping legal relationships, but as a member of a community that gives itself its form of life in law, the national community. Only as a being living in community, as a national comrade is the individual a concrete personality. Only as a member of the national community does he or she have his or her honor and enjoy respect as a legal comrade."³⁵

The unity of "legal comrades" in this sense formed a "legal state".³⁶ "Legal comrades" are united by their full devotion for their legal duties towards the people and only in a secondary way by rights. Their legal status rests in the "honor of the legal comrade", which is unequal.³⁷ "The individual has his true existence only as a comrade of the people: as a member of the narrower communities and of the highest, embracing all, the people", as Gerhard Dulckheit (1904–1954) put it.³⁸ It was ultimately the Führer, who personi-

35 LARENZ (1935) 21: "Thus, the foreigner is not a German citizen, even though he or she is under the protection of our law and participates to a large extent in legal transactions and their facilities and is considered a guest."

36 WOLF (1934/35) 358.

37 WOLF (1934/35) 348 f.

38 DULCKHEIT (1937) 43.

fied all legal relationships.³⁹ Legal Personhood again became a consequence of the membership in a social group, the group of the people which again were defined by race.

Having suffered from this ideology and its execution by the National Socialist State gave reason for Hannah Arendt to claim a “right to have rights”.⁴⁰ This would guarantee all human beings irrespective of their citizenship their dignity. This is also the reason, why after World War II human dignity⁴¹ was transformed into an international human right and a national fundamental right in an increasing number of constitutions. The right to human dignity grants all human beings the right to be acknowledged as a legal subject. This is understood in the light of the four status of Georg Jellinek. It guarantees all human beings those rights necessary to be a full human person in law. Human dignity then is the criterion we were looking for and which had already been outlined in the enlightened Kantian legal theory which requires us to treat all human beings equally with respect to their legal personhood.⁴² It must be a right and not only a principle because otherwise the individual could be made an object to the fulfilment of this principle. It is also necessary that this is a fundamental right because individual rights are general rights of all subjects even without mutual recognition of these subjects. The Brazilian Constitution from 1988 makes extensive use of the principle of human dignity.⁴³ This provides the grounds for recognizing all Brazilians as legal subjects.⁴⁴

With respect to the above-mentioned status, this means that in Brazil no one may be objectified or instrumentalized. It also means that if these legal subjects have to live under humiliating conditions without decent nutrition or health supplies, they have a positive claim to social aid.⁴⁵ Furthermore, these rights may not be donated to them by a generous, perhaps paternalist state; they have to be the expression of their participation if they not be treated as objects of a right given to them as mere charity. Participatory rights

39 DULCKEIT (1937) 50, in a crude interpretation of Hegel’s philosophy of law.

40 ARENDT (1976) 296 f.

41 KIRSTE (2018b) 117–142.

42 KIRSTE (2014a) 274 ff.

43 SARLET (2009).

44 Cf. different articles in KIRSTE et al. (2018).

45 KIRSTE (2013b) 119 ff.; KIRSTE (2018c) 2 ff.

then are necessary for the acknowledgement of the legal person.⁴⁶ It would also violate their positive freedom as autonomous if they were subject to political power they cannot legitimate by participating in its constitution. This also means that citizenship in the sense of being acknowledged as a person with participatory rights stems from human dignity. Thus, persons living in quilombolas, indigenous people living in remote tribes and other minorities must have a right to decent participation. But most of all: Brazilians of all nations have to be acknowledged as legal subjects.

The person in law, again, is not the isolated individual.⁴⁷ One needs recognition in order to be a legal person. One also needs social recognition befitting a social person. Some aspects of one's social existence cannot be established by the individuals alone, but by the groups with which one is living. Language, identity-building through traditions and the environment are such structures that affect the individual as a member of groups. Group rights, therefore, also contribute to personhood. The individual has these rights qua belonging to certain groups – like an indigenous tribe. The group as such may also have collective rights, which should be acknowledged like their identity. Therefore, treaties should be reached between indigenous tribes with respect to their traditional territory.

4 Conclusion

In his “Metaphysics of Morals” Immanuel Kant describes a merely empirical – one could also say: merely doctrinal – jurisprudence like the mask in Phaedrus’ fable, nice to watch, but hollow inside.⁴⁸ That the mask (πρόσωπον, persona) of human beings in law is not merely a nice theoretical construction but serves the interest of human beings, is guaranteed by the principle of human dignity both in the European and in the Brazilian legal systems. This principle provides the criterion for the equal status for human beings to be capable and in fact, have different human and fundamental rights.

46 KIRSTE (2015c) 11 ff. = KIRSTE (2017) 33 ff.

47 KIRSTE (2016) 27 ff.

48 KIRSTE (2001) 345.

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Legal Person and Legal Personality: A View from English Legal History*

1 Introduction

Barbosa's paper maps out the conception of legal personhood in Brazil as can be traced through the lens of citizenship and subject-hood. Codes, he shows, were used to discipline or create a hierarchy of social groups by making one subordinate to another and thereby perpetuating inequality through legal measures. He identifies the invention of this varied status in the 1824 constitution as well as the lifting of these laws in 1891 and 1988. In doing so, he shows the process of legal change and uses periodization to study the changing nature of the legal status of social groups and movements towards legal equality. In common law jurisdictions, the term of "legal person" has a clear meaning but there are general similarities in approach. Legal personhood was a status granted by the state and enforced through legal mechanisms. The denial of legal personhood created a structure within British society that was intended to ensure that one social group prospered over another. These divisions were not constructed on the basis of nationality or citizenship alone but encompassed a broader set of characteristics, which can be associated with larger class-based issues, such as differing socio-economic relations, identity and masks of conformity. British society was divided through law by religion, gender, race, socio-economic status as well as nationality.

Who could be a legal person in English law? Much has been said in response to this question and it has excited Anglo-American scholars of constitutional and corporate law in recent years. Successive lawsuits in the United States have debated whether corporations would have the same con-

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stitutional rights as a person.¹ It is then to this body of scholarship that we naturally look to for an explanation of the meaning of a legal person. This is the clearest definition as can be found in the English-speaking world. Marsh and Soulbby state that “[a] legal person is anything recognized by law as having legal rights and duties. With one main exception, a legal person in this country [England] is simply a person in the ordinary sense: a human being.”² The law will, however, grant a legal personality to an artificial person through incorporation. The central question should then perhaps be re-phrased: who had a legal personality and the legal rights and duties that went with it? How did legal persons, their rights and duties change over time?

This chapter considers this question within the confines of English legal history.³ As most bodies of English law remain uncoded, the sources of English law were considerable. Lawyers looked to statute law, case law as well as legal books and legal texts for a better understanding of the letter of the law. Rights were enforceable and duties upheld through litigation. Where there was legislation or a set of general principles appeared, case lawyers needed examples in order to understand how the law operated in practice. In absence of a legal precedent, it was not always clear how these rights would manifest until that litigation had taken place or legislation was passed to clarify the legal position. English lawyers could not, as in Barbosa’s example, simply trace law through a code or a single statute with its later express or implied repeals, its amendments and later revised versions.

Blackstone’s guide was first published in 1765 and it was the foremost legal text of its time. It was widely available and therefore relatively well read; it was the starting point for those conducting legal research and seeking to understand the law. Blackstone summarised the problem that most lawyers faced when examining legal personalities, rights and duties in his chapter “Of the Absolute Rights of Individuals”. Here he began by stating that:

- 1 American case law is persuasive as opposed to binding in the English system. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
- 2 MARSH/SOULSBY (2002) 54.
- 3 Great Britain, after the Acts of Union in 1707 and 1800, comprised of England, Scotland and Ireland. Scotland had a different legal system and this paper does not intend to deal with it. This paper discusses Ireland only when it pertains to religion and religious dissenters.

The objects of the laws of England are so very numerous and extensive, that, in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion.⁴

He proceeded to list the legal rights that he considered to be important to individuals: (1) the right to personal security, (2) the right to personal liberty, and (3) the right to property. In this chapter, Blackstone spoke little of duties, but as we shall see, duties were often the opposite of a right.

The last of the three essential rights, which Blackstone considered that legal persons should have, was fairly self-explanatory. The first two were a little more obscure. Blackstone defined the right to personal security as “a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his heath, and his reputation”.⁵ Personal liberty involved having the freedom to pursue a course of “changing situation” and “locomotion” and follow “one’s own inclination [...] without imprisonment or restraint”.⁶ While in Blackstone’s view he saw three rights as being essential to being a legal person, not all of these three rights were available to all groups or classes of people in England. This chapter examines the position of subjects, women, religious groups, groupings along the lines of race, and corporations in relation to these three rights.

This chapter does not follow the trajectory of Barbosa’s paper in mapping out the history of rights and duties as they evolved over the 19th and 20th century. Indeed, it cannot do so. Neither is this paper intended to document the history of each social group and their contestations for equality in a complete or absolutist fashion. There is too much to be said in this regard. The short length of this chapter and the multiplicitous nature of legal sources in the common law legal system mean that only landmark moments or significant incidents can realistically be discussed. This chapter, therefore, proceeds to trace the historical developments by examining the groups and classes of individuals and the rights they had (or did not hold) as well as the duties that they held to one another (or did not have). It does this to place emphasis on the nature of domination/subordination and to indicate the extent of this

4 BLACKSTONE (1768) 121.

5 BLACKSTONE (1768) 134.

6 BLACKSTONE (1768) 134, 136.

practice as well as to draw out common themes and comparisons between various groups.

2 The monarch, subjects and citizenship

Natural born subjects were, for a relatively long period of time, understood to be those born in the dominions of the Crown. In exchange for their allegiance to the monarch, he or she owed them a duty to protect them.⁷ Legal persons were mainly categorised as subjects, aliens, and natives. Aliens were usually born outside of the British Empire and they did not have the monarch's protection. As such, this group had fewer rights than subjects; they could purchase land and other estates and inhabit them and also pass them on, however the King was entitled to use the alien's property.⁸ The legal term "native" did not develop in English case law as significantly it did in some of the other jurisdictions in the British Empire.

While the naturalisation process was usually a matter for the houses of parliament, these rules were historically determined by the common law courts. The British Nationality and Status of Aliens Act 1914 changed the form in which the law existed. The 1914 Act was consolidating legislation: it codified common law rules and brought them together into one statute. It made minimal changes to the substance of the law, although one notable change was that nationality was not lost through marriage. The British Nationality Act 1948 changed the substance of this body of law significantly as it changed the status of those located in jurisdictions in the common law world. It did so through the introduction of the "Commonwealth citizen". This development occurred during the post-colonial period; as independent countries introduced new citizenships,⁹ it meant that individuals were able to retain their association with the monarch and Great Britain, more generally. The Immigration Act 1971 altered this dynamic as it introduced the right to abode. Commonwealth citizens now only had a right to live in the United Kingdom if a husband, parent, grandparent had a connection to the

7 BLACKSTONE (1768) 371.

8 *The Earl of Bedford's Case* (1585) 7 Coke Reports 7b, 77 ER 421.

9 See, for instance, Canadian Citizenship Act 1946, Australian Citizenship Act 1948 and New Zealand Citizenship Act 1948.

United Kingdom. It meant that those who had a long-standing association to Britain lost their right to stay in the country.

3 Women, children and other dependents

Family law, and the rights and duties of those who were married, were historically tied to the notions of *baron* and *feme*. When a woman married in the eighteenth and for most of the 19th century, they became a *feme covert* and were subordinate to their husband, the *baron*. Through this legal process, the wife's property became their husband's property and the two were in law inseparable, although represented as one legal person, namely, the husband. An unmarried woman, known as a widow or spinster, was in law a *feme sole*. She could own property and hold debts in her own name. There was ambiguity over the extent to which a husband could exercise his will physically and legally restrain, discipline and correct his wife as well as his children and his servants. Some interpretations of the rules understood that the punishment was acceptable by law provided that it was moderate,¹⁰ although ambiguities persisted.

The husband, parent and master held a reciprocal set of duties to the subordinate. This mirrored the laws regarding the monarch and his subject. It was thought to emerge from the feudal system, where the lord or baron was supposed to be responsible for those beneath him. The master had an obligation to support his servants in times of ill health; he could not terminate their contract for this reason or upon learning of this fact.¹¹ The husband took on debts incurred by his wife before their marriage and was obliged to repay them.¹² The guardian of children held a fiduciary duty to manage the estate in order to benefit the children rather than himself.¹³

The legal rules acted to uphold patriarchal systems of power until their amendment or repeal (although the extent to which it still envisions women as the second sex remains debated). The Married Women's Property Act of

10 BLACKSTONE (1768) 371.

11 *R v Sutton* (1794) 5 T R 659.

12 *Etherington v Parrot* (1703) 1 Salk 118, 91 ER 110, *War v Huntly* (1703) 1 Salk 118, 91 ER 111, *Obrian v Ram* (1687) 3 Mod 186, 87 ER 119.

13 *Henley v _____* (1685) 2 Ch Ca 245, *Anonymous* (1707) 1 Salkeld 155, 91 ER 143.

1882 ended the status of *feme covert*.¹⁴ Married women were then able in law to own property and create debts in their own name.¹⁵ In 1991, marriage was no longer a viable legal defence against accusations of rape. The House of Lords ruled that the law did not permit a husband to have sex with his wife without her consent.¹⁶ The formal legal recognition of women's equal rights to pay and employment came in the form of the Sex Discrimination Act, which was passed in 1975.

4 Religion, denomination and dissenters

From the time of Henry VIII (1491–1547) and the break with Rome, religion (or discrimination based upon denomination in the Christian faith) was used as a way to order society and deny groups from holding equal rights. It prevented rival groups from building up money and power which might lead to successful rebellions against the monarch. Legal sanctions thus gave one group of individuals less rights and duties than others. The Oath of Allegiance and Supremacy was introduced by several Acts of Parliament in 1534.¹⁷ It meant that those who held public office in England must swear allegiance to the King as monarch and the head of the Church of England rather than the Pope. The Treason Act 1534 widened the scope of treason.¹⁸ It was treason to deny the King's supremacy and treason was punishable by death.

This law, together with other efforts, effectively excluded Catholics and other religious non-conformists from holding political and judicial office as well as a number of other professions. It also prohibited these groups from purchasing land and inheriting property. Other public institutions, such as Oxford and Cambridge University, followed the state in excluding these groups from using their facilities. This was one of the reasons why Quakers and Jewish families as well as other religious dissenters entered into other professions, such as those in the finance and banking industry.¹⁹ Given the

14 45 & 46 Vict c 75.

15 Some would argue that in practice married women did own property in their own name. MALTBY/RUTTERFORD (2006), 220; NEWTON/COTTRELL (2006) 315; FREEMAN/PEARSON (2006) 265.

16 *R v R* [1991] UKHL 12.

17 See later editions, 13 Will III c 6. It was to be tendered to those suspected of disaffection by two justices of the peace. 1 Geo I c 13, 6 Geo III c 53.

18 26 Hen VIII c 13.

19 Usury laws do not apply to this group either.

nature of this policy, persecution based upon religious beliefs was a matter of self-identification, i. e. those who did not wish to become a member of the Church of England and identified openly as Catholic or as perceiving the Pope to be the highest authority were persecuted. Lord Chancellor Sir Thomas More, together with a handful of other individuals, were tried for treason and executed in 1535 for this very reason. This was the sum total of individuals who openly refused to swear the Oath and opposed the break with Rome during this period.²⁰

Religious practices, habits and gesticulations, on the other hand, could be identified informally or through testing. In close-knit communities, such as those in England, transactions and behaviours could be monitored by local society and prosecuted by local magistrates if not taken more seriously and investigated by the Court of the Star Chamber in London. As this behaviour could be punishable through legal means, it was hidden from view. The political classes, including senior members of the judiciary, were openly vehemently anti-Catholic up until around 1830.²¹ Catholic emancipation, often known as the Catholic question (and later, the Irish question given the number of Catholics in Ireland), was debated among politicians and lawyers from around 1760 onwards. These debates culminated in several pieces of legislation, which incrementally acted to repeal some of the legislation that actively prevented Catholics and other religious dissenters from exercising their rights to hold property or the ability to enjoy unrestrained activities. The most significant Act was in this piecemeal process was the Emancipation Act of 1829.²²

The legal regimes inspired by anti-Catholic views, while now a relic of history,²³ were formative in English society. Britain's traditions, its celebrations and national rituals are a product of historic anti-Catholic sentiment; they remain steeped in a discarded and forgotten discourse about the division between denominations. Guy Fawkes night, also known as Bonfire night, is held each year on November 5th. It involves the burning of hay-

20 Elton has characterised the constitutional revolution as conservative. See ELTON's (1962) seminal text.

21 A notable example is Lord Eldon who was the Lord Chancellor and only judge in the Court of Chancery. See chapter 9 'Upright Intentions' in MELIKAN (1999).

22 10 Geo IV c 7.

23 The British Attitude Survey shows that Britain is becoming increasingly secular and a-religious.

stacks or woodpiles and setting off fireworks; it commemorates the failure of the Gunpowder Plot. The Gunpowder Plot was an attempt led in 1605 by a group of English Catholics to blow up the Houses of Parliament and assassinate the protestant King James I. The plot failed as Guy Fawkes, an English born man who converted to Catholicism when in Spain, was discovered at the Houses of Parliament with gunpowder. Along with his alleged co-conspirators, Fawkes was hung, drawn and quartered. Today, children make effigies of Guy Fawkes as way of raising money and encouraging donations (using the motto “a penny for the guy”). The effigy of Fawkes is later put on top of the bonfire.

After the formation of the Church of England, those associated with the Anglican Church did not share equal rights with ordinary legal persons. They had what was thought to be a preferential status which was encapsulated by a different and often superior set of legal rights. Clergymen were disciplined separately from the rest of society; ecclesiastical courts were thought to have less severe punishments. The benefit of clergy allowed clergymen to escape punishment imposed by the ordinary local courts. To exercise this right, the clergyman read from the Bible.²⁴ When the population of England became more literate, other tests were implemented to ensure that this power was not being abused by other social groups. While clergymen had a different right to liberty than most, their ability to gain financially through the ownership of property was limited.²⁵ This, however, did not stop them from conducting business or investing. When share ownership became common in the 1830s, it was not clear how these laws should apply to clergymen who invested in joint-stock companies. Retrospective legislation was passed through hurriedly to prevent contracts given out by these joint-stock companies from being invalid.²⁶ There were a large number of acts passed in the reign of George III making specific offences felonies without benefit of the clergy and the Criminal Law Act of 1827 abolished it in the case of murder.²⁷

24 Benefit of Clergy Act 1351 25 Edw III c 4.

25 21 Hen VIII c 13 restricted clergymen from entering the House of Commons, taking any lands or tenements to farm (or be fined 10 pounds a month), avoiding leases, and not engaging in trade or the sale of merchandise (or be fined treble the value).

26 See RUTTERFORD/MALTY (2006) 111.

27 7 & 8 Geo IV c 28.

5 Racial minorities

Unlike religious denomination or spiritual persuasion, which could be hidden, tested or probed, race or ethnicity was obvious from the outset. Individuals did not have to belong to a community or know each other or their family for generations to see that they had different racial backgrounds. From a single glance, colour was obvious. Although the enslavement of black individuals was prevalent in the British Empire, relatively few were brought back to England. Their labour was used to produce raw materials in the colonies. The product of their labour was, however, transported back to England and consumed or used in the manufacturing process which took place there.²⁸ Under the English Navigation Acts,²⁹ slaves were akin to tobacco, whalebone, cotton, indigo, and ginger. They were categorised as commodities and were not understood to be legal persons with rights, such as to be paid for their labour or to own property in their own name. England did not develop rules or the codes regarding the toleration of ill treatment of this group, which can be seen in some of its former colonies.³⁰

One prominent case, which was heard in the English court of the King's Bench was *Somerset v Stewart* (1772) in which a slave with the help of anti-slavery campaigners sued his master and used a writ of habeas corpus to gain access to the court.³¹ The slave, Somerset, won the case. Lord Mansfield, the Chief Justice, presided and his judgment in this case has been debated at length. Some understood it to mean that slavery was acceptable in the colonies but not in England. Others saw it to mean that slaves could not be detained and removed from England by force. With the passage of the Slavery Abolition Act in 1833,³² this debate over the legal position was ended firmly. When analysing the common law position and Mansfield's views, Mansfield's biographers have pointed to his relationship with Dido Elizabeth Belle, who was a family member and lived with him at Kenwood House. Belle was not white: she was the daughter of Mansfield's nephew and an enslaved African woman.

28 HOBBSBAWM (1999).

29 The first one was passed in 1651, see 12 Cha II c 18.

30 NICHOLSON (1994) 38; RUGEMER (2013) 429.

31 *Howell's State Trials*, vol. 20, cols 1–6, 79–82 (1816).

32 3 & 4 Will IV c73.

While England did not have anti-miscegenation laws that criminalised the union of those from different racial backgrounds,³³ this should not be taken to mean that there was not racial segregation or discrimination against non-whites. Informal and non-legal barriers rather than formal and legal barriers existed. Discrimination also came from the auspices of the state. British politicians and its society reacted to the influx of non-white migrants from the Commonwealth countries in the 1960s, but in particular those from the British West Indies and Asian countries.³⁴ The Bristol Bus Boycott of 1963 began as the managers of the Bristol Omnibus Company, a nationalised and publicly owned company, operated a “colour bar” and so refused to employ black or Asian bus drivers. Where it was unclear or there was no statement of law to say such behaviour was illegal, a statement of law was needed to address the silence. In other words, those discriminated against needed to litigate to assert their rights and to test to see if their unequal treatment was illegal. Legislation in the form of the Race Relations Act 1965 clarified that racial discrimination, such as this, was unlawful. The 1965 Act applied only to “places of public resort”;³⁵ it excluded private areas, such as employment, housing and shops. In 1968, the Race Relations Act was passed to extend the legal protections offered.

6 Corporations

Human beings were not the only group to hold the status of a “legal person”. Artificial entities held this status as well. Groups of individuals could join together to form a company. If it were a corporation, the group was a single entity and a legal person or single legal name in its own right. The significance of the word “corporation” was that it had a firm legal definition; a corporation had a legal personality of its own that was not tied to that of its owners.³⁶ With a separate legal personality, the corporation could enter into contracts in its own name, its debts and liabilities could be separated from

33 In the United States, state law which prohibited interracial marriage was deemed unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967).

34 From reading political speeches, such as that Enoch Powell’s ‘Rivers of Blood’, it was clear that the opposition was to immigrants not to those generally but specifically to those with a non-white heritage.

35 Race Relations Act 1965 s 1 (2).

36 KYD (1793) 12–19.

that of its owners and they were limited in their liability.³⁷ If in law it was not a corporation with its separate legal personality, it was a partnership. Partnerships or non-corporate entities were not legal persons but known in law by the names of the individuals and legal persons who came together to form the group. Those using the corporate form were not only businesses, but also civic entities, such as the King as well as cities and universities.

Individuals were not free to join, create or act as corporate entities unless they had a corporate charter, which was usually granted by the parliamentary process and an Act of Parliament. For businesses, the Repeal of the Bubble Act in 1825 lifted some restrictions on share trading but it did not allow all firms to use the limited liability corporate form.³⁸ Some businesses did not push individually for limited liability but often settled for the right to use a single person as the company's public officer rather than having hundreds of shareholders sign contracts and conduct litigation. Even so, gaining this latter right was not always straightforward. The Bank of England contested the attempts of rival banks to use a public officer.³⁹ The Bank of England was an established enterprise with strong legal and political connections – its officers were closely linked to the government and its success was tied to public finances.⁴⁰ Entrepreneurs were allowed to operate with separate legal personalities and use the limited liability corporate form after 1856 when general incorporation legislation was passed.⁴¹ It was not until *Salomon v Salomon* in 1897 that there was understood to be serious judicial commentary on what the doctrine of a separate legal personality meant.⁴²

7 Conclusion

This chapter makes three generalisable points about the pattern of law which aimed to give rights to a broader range of groups and classes of people. First, the analysis notes that there were periods and decades of legal developments, which may marry up to reform movements in other jurisdictions. The letter

37 Of course some claimed to have limited liability; see *R v Dodd* (1808) 9 East 516.

38 6 Geo IV c 91.

39 HARRIS (2000) 271–273.

40 DESAN (2014).

41 18 & 19 Vict c 133.

42 [1896] UKHL 1, [1897] AC 22.

of the law may have varied but there were transnational and global dialogues that led to convergences in the timings of reform. In England, the 1830s and the 1960s were moments of change. Where reform embraced diversity or equality, it was often followed a decade or two later by legal responses through which the law was revised, tightened or reversed. As these swings appear also across sub-divisions, the thematic structure of this piece perhaps prevents this point about chronology from being observed as clearly as it might be. When the legal concept of citizenship was broadened in 1948, race became a political and legal issue in the 1960s and 1970s. In other areas, it may appear as if there was a sense of progression – in a somewhat linear manner – towards a state of legal equality. Yet, these incremental changes were highly contested; it was far from a one-sided debate with an obvious clear outcome.

Second, debates over who should be a legal person and denial of rights have often been forgotten in public memory. Remnants of historical maltreatment are still evident in the fibre of social behaviour – even if the historical context is long forgotten and this view no longer endorsed or enforced by the letter of law. One such example is Bonfire night and the burning of Guy Fawkes. This historic practice has survived, but the event no longer holds the same objective nor meaning as a way of constructing a social group. The societal norms or behaviours are figurative and these ceremonial acts have lost their meaning as a ritual. Yet, their existence is illustrative of the way British society behaved in the past and the laws, which governed it and so delineated social groups.

Third, and finally, is the disconnect between the legal regime and social behaviour. Top-down change, such as in the Henrician Reformation, was often ineffective in its attempts to promote hegemony or the movement towards a single religion. This point should not be taken to mean that legal change is unimportant or that it does not matter. Indeed, law can be useful in ushering new ideas and in creating changes to attitudes and beliefs. However, there are few examples of the law pushing society in this chapter. It generally identifies a process that has moved in the opposite direction. This chapter shows common ways of achieving reform across these socially constructed groups in England and the patterns of legal change. Legal reform in England was often caused by the need to clarify the common law position or precipitated by the denial of rights. While the exclusion of classes or groups was generally thought to be legal and well within the remit of what was then

the current law, those in the surrounding community no longer believed that this behaviour was acceptable; they demanded change. In the 1960s and 1970s, in particular, changes in the law reflected changes in society and its attitudes. Lawyers followed rather than led these developments.

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Section V

Linguistic Diversity and the Language of Law

Linguistic Diversity and the Language of State Law in Colombia, 1819–2019*

Colombia's geography set the stage for its vast cultural and linguistic diversity. Located in the northwest corner of South America, Colombia is at the crossroad of Mesoamerican, Incan, Caribbean, and Amazonian cultures.¹ Its rough and diverse geographies, however, hindered contact between native peoples, prevented the Spanish Empire from consolidating its authority over all of the territory, and hampered the nation-state building after Independence. Thus, despite colonial and republican efforts to Hispanicize peoples and territories, Colombia has currently around 102 indigenous peoples speaking 65 indigenous languages in addition to two Creole, and two Roma languages.² This linguistic diversity, however, is demographically unbalanced: of a total Colombian population of about 41,000,000 people, only 700,000 are speakers of indigenous languages, and fewer than 35,000 speak a Creole language. Moreover, about half of the 65 Colombian indigenous languages have fewer than 1,000 speakers, which places these minority languages on the verge of extinction.³

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1 TRIANA Y ANTORVEZA (2000) 1.

2 The 2005 General Population Census (2005 GPC) registers 87 indigenous peoples in Colombia, a figure that rises to 102 peoples according to the Colombian Indigenous National Organization (ONIC). As per the 2005 GPC, out of a total of 40,607,408 individuals who answered the question on ethnic affiliation, 1,393,623 identified themselves as “indígenas”, which corresponds to 3.43 % of the total population; 4,273,722 as “afrocolombianos” (10.3 %); 7,470 as “palenqueros” (0.02 %); 30,565 as “raizales” (0.07 %); and 4,857 as “rom” people (0.01 %). The last Colombian general population census was conducted in 2018, but its results are not available yet. DANE (2007); ANDRADE CASAMA (2010).

3 The number of indigenous-languages speakers (700,000) accounts for 50.25 % of the total of the indigenous population (1,392,623). Meanwhile, speakers of the two Creole languages are the ‘palenqueros’ (descendants of the Maroon people of San Basilio del Palen-

Spanish has been the language of law in Colombia or, to be precise, the language of the state law. This qualification makes space for the myriad of indigenous normative systems that have coexisted, albeit beyond the awareness of state law, as well as of the official state legal system.⁴ Even though some of these indigenous normative systems are also conceived, produced, and communicated in Spanish (particularly those of peoples who have lost their vernacular languages), many others are embedded in very different linguistic, epistemic, and normative traditions.⁵ The language of Colombian state law has operated as a device both of discrimination and assimilation, even though indigenous people have also availed themselves of it to resist dispossession, and cultural assimilation. Being an arena in which actors with different ethnic and cultural backgrounds participate, the official state legal system has faced the fact of plurilingualism since the colonial era onward.

By examining changes and continuities in linguistic policies and legislation, as well as by studying specific cases that illustrate the challenges indigenous linguistic diversity poses, we can begin to understand how linguistic diversity has manifested itself within the legal arena, and how the language of the state law has been used for purposes of discrimination, assimilation, or intercultural communication. The time frame, 1819 to 2019, begins with the postcolonial era and runs to the present day. This broad timeline is divided into three periods – the early republican era (1819–1886), the consolidation of a unitary and monocultural nation-state (1886–1990), and the ongoing shift toward multiculturalism (1991 to the present) – which correspond with turning points in Colombian politics and indigenous policies.

Critical features of the Spanish Empire shaped colonial and postcolonial legal responses to linguistic diversity. The first one is the invention of ‘Indian’ as a category that enabled homogenization of the colonized peoples. The imagined ‘Republic of Indians’ – counterpart of the ‘Republic of Spaniards’ – served as a legal fiction to manage diversity by lumping together a wide array

que) and the ‘raizales’ (native people of San Andrés y Providencia islands). The total of Creole-language speakers (35,000) represents 92% of the people who identified themselves as ‘palenqueros’ and ‘raizales’ (38,035). There are no data available on the number of Roma-language speakers in Colombia. LANDABURU (2004–2005) 3–4.

4 TAMANAHA (2008) 397.

5 For an in-depth examination of indigenous cognitive systems and discursive practices, see VIVAS HURTADO (2013).

of ethnic and linguistic ‘others’ who were indistinctly labeled as ‘Indians’. Additionally, Catholic confessionalism and Castilian monolingualism carved out the cultural basis of the Spanish Empire. While there was no place whatsoever for religious diversity, the Spanish Crown allowed and even fostered the use of some indigenous languages as a means of Hispanicization and evangelization of the natives.⁶ Except for instances of indigenous jurisdiction at the local level, written Castilian remained the language of the law during the colonial era, which led to the mediation of Spanish-speaking scribes and interpreters in legal proceedings involving illiterate and non-Spanish speakers.⁷ Such monolingualistic legal tradition endured far beyond the end of the colonial period in Colombia and other former Spanish colonies, providing a point for comparative analysis with experiences beyond Latin America. Specifically, the Colombian case stands in striking contrast to the experiences of Austria-Cisleithania, Turkey, and Russia, which will be analyzed by Simon’s, Muslu’s, and Kirmse’s contributions to this volume.

6 There were, however, some variances in the ways Habsburgs and Bourbons conducted this policy. In accordance with the Council of Trent’s provisions (1563), the Habsburg monarchs promoted the use of some vernacular languages (officially regarded as “general languages”) for the purpose of Hispanicization and evangelization. *Chibcha* (also known as *muisca* o *mosca*), *quechua*, *sáliva* and *siona* were declared as the general languages in the New Kingdom of Granada. The Habsburgs endorsed the creation of chairs of general languages and required priests to certify proficiency in these vernacular languages as a condition of being appointed as *doctrineros* (parish priests in Indian villages). From the late 16th and throughout the 17th century, Franciscan, Dominican, and Jesuit friars crafted grammars, vocabularies, and catechisms in vernacular languages. The Habsburg policy of promoting vernacular languages, however, did not prevent the decline of *Chibcha* and other native languages, particularly those that had been spoken at the central areas of the New Kingdom of Granada. The Bourbon reforms contributed to such decay of the native languages. In 1767, the Spanish Crown ordered the expulsion of the Jesuits, who had made remarkable contributions to the knowledge of indigenous languages. In 1770, Charles III issued a Royal Decree banning the use of vernacular languages and making the use of Spanish mandatory, though it was unevenly enforced and met some resistance in the colonies. By the late 18th century, some New Granada viceroys still fostered evangelization in vernacular languages, while Enlightened scholars and friars engaged in the study and teaching of Amerindian languages. On linguistic policies during the colonial period, see ORTEGA RICAURTE (1978) 13–112; TRIANA Y ANTORVEZA (1987); PINEDA CAMACHO (2000) 49–86; VILLATE SANTANDER (2003).

7 YANNAKAKIS/SCHRADER-KNIFFKI (2016); CUNILL/GLAVE (eds.) (2019).

1 The early republican era (1819–1886)

After Independence, Colombian political and intellectual elites enthusiastically embraced Spanish grammar as a key element of nation building as well as a ‘civilizing’ tool that would form good citizens and rulers by instilling the rules of correct thinking, writing, and speech.⁸ Early republican legislation ordered the creation of elementary schools in all of the country’s villages, as well as the creation of colleges and universities in the major urban centers.⁹ While Spanish literacy was at the core of the elementary school’s curriculum, students at the higher levels were also to be taught classical and modern foreign languages, as well as indigenous ones. The 1826 Law on Public Schooling established that literature classes at the universities were to include the indigenous languages prevailing in the region. The same rule was reiterated by the 1842 Decree on Universities.¹⁰ There is no evidence that this provision was actually enforced, as at the time, the Colombian elites were more interested in learning English and French than local vernacular languages. This rule bears historical significance, however, since, after the 1842 Decree, Colombian legislation has not mandated the teaching of indigenous languages at the universities, thereby, further demonstrating the dominance of the Spanish language in the early republican era.¹¹

The indigenous population was a specific target of the ‘civilizing’ campaign launched by postcolonial lawmakers, and carried out in two different ways. *Indígenas* already settled in villages were to be assimilated into the nation as rural peasants via the privatization of their communal lands (*resguardos*). Meanwhile, the ‘savage Indians’, those roaming the lowlands forest, were to be settled in indigenous reservations and “inducted into civilized life” by the Catholic missions.¹² In 1824, the Colombian Congress

8 PINEDA CAMACHO (2000) 83–114; DEAS (1992).

9 See the laws of August 6th, 1821, and March 18th, 1826, in: COLOMBIA (1924) I, 25–30; II, 226–244.

10 Articles 21 and 33 of Law of March 18th, 1826; Article 123 of Decree of December 1st, 1842, in: COLOMBIA (1924) IX, 611.

11 TRIANA Y ANTORVEZA (1973) 1251–1252; PINEDA CAMACHO (2000) 94–95.

12 On division of *resguardos* and elementary schools in indigenous villages, see Laws of October 11th, 1821; March 6th, 1832; and June 2nd, 1834. On “induction of ‘savages’ into civilization” see Law of August 3rd, 1824; Decree of May 1st, 1826; Law of May 15th, 1833; and Decree of April 28th, 1842, in: COLOMBIA (1924) I, 116–118, 402–403; II, 333–334; IV, 344–345; V, 11–12, 349–352; IX, 344–345.

issued a law that reestablished the missions. One of their tasks was “to teach the Castilian language to the natives”. Still, lawmakers also seemed aware that, in order to accomplish it, knowledge of vernacular languages was needed. This law therefore also instructed the Church to collect “dictionaries, grammars, indices, and compendia of the various indigenous languages”, and to make copies of them to distribute among the missionaries.¹³

This concurrent interest in ‘civilizing’ the natives while collecting information about their diverse languages and cultures became stronger by 1850, when the rise of the agro-exporting economy increased the colonization of the country’s lowlands. At that time, Tomás Cipriano de Mosquera’s and José Hilario López’s modernizing governments sponsored the Chorographic Commission, a scientific expedition in charge of mapping the whole country and depicting its regions’ physical, socio-economic, and human geography.¹⁴ The commissioners provided an on-the-ground depiction of the country’s cultural diversity that paved the way for the surge of ethnolinguistic research that flourished by the 1870s, when the emergence of Americanist studies sparked scientific interest in indigenous languages and cultures.¹⁵

Throughout the second half of the 19th century, Colombia experienced intense political strife and civil wars between Liberal and Conservative factions, with church-state relations being one of the major points of contention. Although the Liberal Radical regime (1863–1880) took a tough stance towards the Catholic Church, liberal lawmakers passed legislation that relied on missionaries as cultural brokers. Liberals entrusted missions with the task of “studying and setting forth in alphabetic writing the languages of the various tribes” and collecting their ethnographic and demographic data. Liberal lawmakers also promoted the creation of missionary schools where candidates working toward becoming missionaries were to be instructed in native languages.¹⁶ This legislation shows that 19th-century Colombian

13 See Articles 20 and 21 of the Law of July 30th of 1824, reproduced in: TRIANA ANTORVEZA (1980) 83–87.

14 APPELBAUM (2016).

15 ORTEGA RICAURTE (1978) 116–148; PINEDA CAMACHO (2000) 101.

16 See Article 11.9 of Law 11 of April 27th, 1874, on “fomento de la colonización en los Territorios de Casanare i San Martín”, and articles 3.1, 9, and 13 of Law 66 of July 1st, 1874, on “reducción y civilización de indígenas”, in: COLOMBIA (1924) XXVII, 36–40, 134–138.

elites envisioned a Mestizo and Hispanophone nation, but approached the indigenous question in a way that differed from the military subjugation of the ‘savages’ that was carried out in Argentina, Chile, and the United States of America.¹⁷

The awareness of the country’s linguistic diversity, however, barely permeated the language of the state law during the early republican era. Colombian state law was entirely conceived, written down, communicated, and enforced in formal Spanish by lawmakers and officials, some of whom were prominent philologists. Andrés Bello’s *Gramática de la Lengua Española* (1847) and *Código Civil Chileno* (1852) set the standard for the legal language in Hispanic America, particularly in Colombia, where cultivating a fine Castilian was not only part of the jurists’ training but, more broadly, a desired marker of national identity. There was, therefore, no place for plurilingualism in the legal language of Colombia during the 19th century, except for the norms that provided for the use of public interpreters in courts and officials’ interactions with indigenous tribes and natives of the San Andrés and Providencia islands.¹⁸ Concerning the latter, difficulties in ensuring sovereignty in this Caribbean territory led to a small but significant exception to the pattern of legal monolingualism that prevailed in the 19th century. In 1869, the Colombian government provided for the translation of the 1863 Liberal Radical Constitution and other pieces of legislation into the English-Creole language of San Andrés and Providencia, being the first antecedent of the recognition of Creole languages in Colombia.¹⁹

2 The consolidation of a unitary-monocultural nation-state (1886–1990)

In the 1880s, conservatives took power, inaugurating a centralizing, pro-Hispanic, and deeply Catholic era known as ‘the Regeneration’. The link

17 PINEDA CAMACHO (2000) 101.

18 See Law of June 1st, 1847, on public interpreters; Decree of April 12th, 1869, on public interpreters in San Andrés and Providencia Islands, in: COLOMBIA (1924) XII, 116–118; XXIV, 104. See also Articles 583, 599 to 606 of the 1872 Judicial Code, in: COLOMBIA (1894) 72–75.

19 Decree of April 12th, 1869, “mandando traducir al inglés la Constitución Nacional y las disposiciones relativas a la administración de los Territorios Nacionales”, in: COLOMBIA (1924) XXIV, 105; PINEDA CAMACHO (2000) 102.

between mastery of the Spanish language, national identity, and political power became stronger during the era of Conservative hegemony (1885–1930). Five out of the twelve presidents who ruled during this period were also prominent philologists and writers, with Miguel Antonio Caro being a case in point. Caro, who drafted the 1886 Constitution, envisioned a nation built upon Hispanic heritage without any traces of the racial, cultural, and linguistic background of indigenous and black peoples.²⁰

As in the colonial period, Castilian monolingualism paralleled Catholic confessionalism during the Regeneration. The Regeneration's linguistic policy reversed any recognition of aboriginal and Creole languages made during the Liberal Radical regime.²¹ Meanwhile, the Concordat signed with the Vatican in 1887, along with Laws 89 of 1890 and 72 of 1892, turned the responsibility for education and governance of the indigenous population of Colombian peripheral areas (known as *territorios nacionales*) over to Catholic missions.²² Missionaries usually banned the natives from speaking their own languages, though some religious orders used vernacular languages as a means of introducing natives to Catholicism and Spanish literacy. Thus, in the very process of erasing native languages, missionaries paradoxically advanced ethnolinguistic research by keeping records, vocabularies, and grammars of those indigenous languages that were about to disappear.²³

Law 89 of 1890, the most important statute on indigenous affairs of this period, provided temporary protection for *resguardos* and *cabildos* (indigenous councils) for a period of fifty years. By doing so, lawmakers aimed to establish an intermediate and provisional legal status for Andean indigenous peoples who were regarded as neither 'savages' nor 'civilized' enough to be integrated into the nation as ordinary citizens. Although Law 89 did not include any provision intended to preserve native languages, by maintaining

20 DEAS (1992) 49, 64–65; ARIZA (2009) 190–200; PINEDA CAMACHO (2000) 107–114.

21 See Articles 4 and 10 of Law 17 of 1927; PINEDA CAMACHO (2000) 80.

22 Article 31 of Law 35 of 1888, approving the Concordat between Colombia and the Vatican; Article 1 of Law 89 of 1890, "por la cual se determina la manera como deben gobernarse los salvajes que vayan reduciéndose a la vida civilizada"; and Law 72 of 1892, "por la cual se dan autorizaciones al Poder Ejecutivo para establecer Misiones Católicas", in: TRIANA ANTORVEZA (1980) 121–129, 166; ARIZA (2009) 212–216.

23 ORTEGA RICAURTE (1978) 182–196; TRIANA Y ANTORVEZA (1973) 1253; TRIANA Y ANTORVEZA (2000) 15; PINEDA CAMACHO (2000) 112, 143–144.

resguardos and *cabildos*, this law provided a haven where communities who still retained their vernacular languages could use them in their internal affairs. Indigenous peoples appropriated Law 89 of 1890 as the legal support for their claims for land and autonomy. Manuel Quintín Lame, an indigenous leader from the southwestern Colombian Andes, availed himself of both Spanish and legal literacy to translate natives claims into the language of the state, and to carve out a sort of indigenous republican citizenship based on Law 89. *La Quintiada*, the 1914–1916 indigenous uprising led by Quintín Lame in the Cauca region, exemplifies how the Spanish and legal languages were not only devices of domination and acculturation but also arenas of contention, negotiation, and cultural translation that some literate Indians managed to use to resist colonization.²⁴

In 1930, Conservative hegemony came to an end, giving way to the Liberal Republic (1930–1946), a time that witnessed a shift in cultural politics. Since the 1920s, a segment of the emerging intellectual middle class has brought about a cultural and political movement that turned toward indigenous cultures as the very roots of Colombian identity. This *indigenista* agenda resonated in the Liberal Republic's educational policy, which encouraged the study of the countryside and indigenous cultures with the aim of understanding the country's diversity and modernizing it.²⁵ Such a cultural climate boosted ethnolinguistic research and the recovery of some indigenous toponymy.²⁶ The Liberal Republic's linguistic policy was in tune with the resolutions of the Primer Congreso Indigenista Interamericano held in Patzcuaro, Mexico, in 1940, which asserted the importance of the study and use of indigenous languages while prioritizing indigenous literacy in the national language.²⁷

Indigenistas not only produced a significant body of archeological and ethnolinguistic research, but some of them became actively involved in the defense of *resguardos* and took a critical stance on the power of the missions over indigenous communities, leading to conflicts between progressive intel-

24 LEMAITRE (2013); ESCOBAR (2016).

25 PINEDA CAMACHO (1984); TROYAN (2008); RUEDA ENCISO (2008). For an in-depth examination of this topic, see the articles published in the journal *Baukara*, vol. 1 (2012), vol. 2 (2012) and vol. 3 (2013), monographic issues devoted to the origins of Colombian *indigenismo* (available at: <http://www.humanas.unal.edu.co/baukara/numeros-de-la-revista/>).

26 ORTEGA RICAURTE (1978) 150–182; PINEDA CAMACHO (2000) 144–146.

27 See: El Primer Congreso Indigenista Interamericano (1940).

lectuals and the Catholic Church. The Colombian *indigenista* project was disrupted by *La Violencia* that started around 1946, as well as by the political persecution that progressive intellectuals faced during Laureano Rojas' right-wing government (1950–1953).²⁸ A new mission agreement signed in 1953 gave the Catholic Church both temporal and spiritual power in nearly two-thirds of the national territory, where missionaries not only controlled education but exerted police power over the indigenous population. This agreement also banned evangelization by non-Catholic institutions.²⁹

By the end of the 1950s, Liberals and Conservatives agreed to alternate the presidency and share power in what became known as the *Frente Nacional* (1958–1974). In 1958, Alberto Lleras' liberal government appointed anthropologist Gregorio Hernández de Alba, one of the pioneers of Colombian *indigenismo*, as director of the newly created Bureau of Indigenous Affairs.³⁰ In 1962, the Colombian government signed an agreement with the Summer Institute of Linguistics (SIL), a United States-based Christian organization devoted to the study of indigenous languages and the promotion of literacy through translating the Christian Bible into native languages.³¹ The SIL was entrusted with conducting ethnolinguistic research and literacy campaigns among Colombian indigenous peoples, as well as providing interpreters and training in native languages to state officials.³² Although the SIL and the Catholic missions' views on religion collided, both institutions considered the teaching of reading and writing in native languages as a mere step toward Spanish literacy, which remained their ultimate goal (along with evangelization among the natives).³³ Such an instrumental view of indigenous languages was in tune with the assimilationist mindset that inspired the ILO Convention 57 of 1957.³⁴

28 RUEDA ENCISO (2008) 267–272.

29 PINEDA CAMACHO (2000) 146; BONILLA (2006) 301–310; TROYAN (2008) 95–102. The 1953 Mission Agreement was reproduced in: DANE (1971) 55–58.

30 RODRÍGUEZ ROJAS (2016).

31 PINEDA CAMACHO (2000) 147. Correspondence between the SIL and the Director of the Bureau of Indigenous Affairs is available at Biblioteca Luis Ángel Arango (BLAA), Sala Libros Raros y Manuscritos, Archivo Gregorio Hernández de Alba, MSS 2296.

32 The agreement between the Colombian government and the SIL was reproduced in: DANE (1971) 59–60.

33 PINEDA CAMACHO (2000) 149.

34 The International Labor Organization (ILO) Convention 107 of 1957, on “the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Indepen-

The 1970s witnessed a paradigm shift from assimilation to ethno-development owing to the joint effects of the emergence of indigenous grassroots movements and responsive state policies.³⁵ The creation of the Regional Indigenous Council of Cauca (CRIC), a grassroots organization that took up the legacy of Quintín Lame, inspired indigenous mobilization nationwide. The 1971 CRIC Platform of Struggle called for the defense of indigenous history, language, and customs, as well as for training bilingual indigenous teachers and giving communities control over children's schooling.³⁶ Meanwhile, at a time when the state aimed to prevent the advance of guerrilla groups in the countryside, state agencies became more responsive to some indigenous demands.³⁷ In 1978, Alfonso López Michelsen's liberal government passed a decree that provided for bilingual and culturally relevant education for indigenous communities.³⁸ This ethno-developmental approach entailed a significant transformation of linguistic policies: instead of being considered as mere instruments for Spanish literacy, indigenous languages began to be appraised as cultural resources worthy of safeguard in and of themselves.³⁹

Notwithstanding these significant changes in linguistic policies, the language of the state law remained as monolingual as it had been during the 19th century. Individuals interacting in the legal field were supposed to speak Spanish whether independently or assisted by interpreters.⁴⁰ Moreover, since Law 89 of 1890 had left 'savage' and 'semi-savage' Indians out of the scope of the general legislation, there were no provisions for trans-

ent Countries", was adopted in Colombia by Law 31 of 1967. Article 23 provided for indigenous peoples' right to vernacular-language education. It established, however, the gradual transition from the native to the national language, though preserving the vernacular language.

35 On the concept of "ethnodevelopment", see BONFIL BATALLA (1995).

36 BOLAÑOS (2012).

37 RODRÍGUEZ ROJAS (2016) 146.

38 Decree 1142 of 1978. See also PINEDA CAMACHO (2000) 151–152.

39 This new approach led to the creation of the Committee of Aboriginal Linguistics (1983) and the Colombian Center for Aboriginal Languages at the Universidad de los Andes, which promoted research and graduate programs in ethnolinguistics. PINEDA CAMACHO (2000) 154; TRIANA Y ANTORVEZA (2000) 17.

40 On the mandatory use of interpreters in civil and criminal cases, see Article 685 Law 105 of 1931 (Judicial Code); Article 269 Law 94 of 1938 (Criminal Procedure Code); Article 192 Decree 1400 of 1970 (Civil Procedure Code).

lating laws into indigenous languages.⁴¹ Even though Article 26 of the ILO Convention 57 of 1957 affirmed that states were to communicate to indigenous populations information about their rights and duties using their languages if necessary, this provision was weakly enforced in Colombian legislation.

The case of *Wayúus* identity cards exemplifies the lack of compliance with this obligation and the discrimination against linguistic minorities that may arise in the absence of reliable interpreters. From the 1960s to the 1980s, at the request of local politicians interested in garnering votes among the indigenous population of the northern department of La Guajira, officials of the Colombian National Civil Registry issued identity cards for about 2,000 *Wayúus*. Using the excuse of not understanding the natives' language (*wayuunaiki*), the state officials arbitrarily decided to register December 31st as their date of birth and changed their real names to insulting monikers, such as "*coito*" (coitus), "*cabezón*" (big-headed), and "*maribwana*" (cannabis), in a blatant abuse of the natives' Spanish illiteracy and in violation of their basic rights.⁴²

Along with enabling discrimination, the monolingualism of the state law also worked as an efficient device for linguistic assimilation. The growing encroachment on indigenous lands by Mestizo *colonos* sparked the interest for Spanish literacy among the natives, for it was the language they would have to use to bring their land grievances before the administration and the civil courts. That was the case of the *Gunadule* people, settled in a forest region of the Colombo-Panamanian border. Milton Santacruz, a member of this people, explains:

Gunadule traditional authorities (*saglas*) had opposed the entry of missions into the territory until the mid-1960s, when a wave of *colonos* began to settle in our lands. The growing presence of *colonos* raised concern among the *saglas* because the *Gunadule* territory lacked *resguardo* land titles, so they had no legal protection

41 Based on the categories of Law 89 of 1890, contemporary criminal law doctrine defined "semi-savage" Indians as those in the process of being "civilized". DELTGEN (1981) 785; ARIZA (2009) 216.

42 This case was denounced in the documentary "We were born on December 31st" by Priscila Padilla Farfán, based on a story written by the wayúu lawyer and writer Estercilia Simanca Pushaina. SIMANCA PUSHAINA (2007); PADILLA FARFÁN (2011). The reparation of this wrongdoing only took place in 2015. See: "Rectificación de nombres burlescos en el pueblo Wayúu", available at <https://www.youtube.com/watch?v=dzeSqL1o6To>

against such encroachment. At that time, a group of female Catholic missionaries arrived in the territory offering to teach Spanish language on the basis that ‘*Guana-dule* youth must be taught, so they can defend their lands.’ It looked as though the nuns came in God’s name to help *Gunadules* to take care of the territory. Then, *sagla* Tihuitiquiña accepted the offer, saying ‘it seems good to me. What the nuns are going to do is to accompany us and protect us.’”⁴³

While civil and administrative law worked as powerful devices for linguistic acculturation, criminal law gave rise to some opportunities for indigenous languages via expert opinions that anthropologists delivered in criminal trials. Law 89 of 1890 had formally left ‘savage’ and ‘semi-savage’ Indians out of the scope of the state law, so a critical issue during this era was to determine whether an indigenous individual accused of committing a crime actually fit into some of these categories or was ‘civilized’ enough to be held criminally responsible. This decision relied on psychiatric forensic opinions until the late 1960s, when anthropologists began to be asked to intervene in criminal trials as experts, reframing the debate on indigenous criminal liability in terms of cultural differences.⁴⁴ Both psychiatrists and anthropologists considered the lack of Spanish literacy among the factors for excluding *indígenas*’ criminal liability. Anthropologists, however, took a decisive step toward bringing cultural and linguistic diversity into the courts by introducing the cultural analysis of indigenous concepts as crucial elements in the adjudication of criminal cases. Through these exercises of cultural translation, a few indigenous concepts permeated the language of adjudication over criminal matters.⁴⁵

Even if not fully recognized by the state, indigenous legal customs were still practiced alongside the state law. The legal monism of the republican state prevented it from acknowledging the existence of indigenous justice. Moreover, since indigenous legal practices were embedded in the natives’ social fabric, worldviews, languages, and oral tradition, at least some of them remained invisible and unintelligible to the westernized eye of the republican authorities. The role of dreams, rites, myths, advice, conciliations, shamanic mediations, and respect for nature, among other elements typical of

43 Milton Santacruz Aguilar, *Gunadule* scholar, interviewed on March 4th, 2019.

44 ARIZA (2009) 212–238.

45 On these exercises of cultural translation, see SÁNCHEZ BOTERO (1992); VÉLEZ (1985); GÓMEZ VALENCIA (2000) 105–113; DELTGEN (1981) 788–805.

indigenous legal cultures, worked as barriers that put natives' systems of justice out of the control of the church and the state law.⁴⁶

3 The ongoing shift toward multiculturalism (1991 to 2019)

The year 1991 marked a watershed moment for Colombian politics and the indigenous movement as well. A widely participative National Constituent Assembly passed a new constitution that repealed the 1886 one. Three indigenous leaders took an active part in the constitutional reform, marking the beginning of indigenous participation in state legislative bodies. This was also the first time that an indigenous language was spoken in the process of state lawmaking, for the *guambiano* leader Lorenzo Muelas Hurtado delivered a brief part of his inaugural speech in his native language in order to make a statement on the recognition of cultural and linguistic diversity.⁴⁷

The 1991 Constitution recognizes Colombian ethnic and cultural diversity and provides for social, economic, political, and cultural rights for the country's ethnic minorities.⁴⁸ Concerning linguistic diversity, Article 10 establishes that, "Spanish is the official language of Colombia. The languages and dialects of ethnic groups are also official in their territories. The education provided in communities with their own linguistic traditions will be bilingual." This precept was further developed by Law 1381 of 2010, a comprehensive statute that provides for the conservation, promotion, and strengthening of Colombian native languages.⁴⁹ Concerning the legal field, this law grants native languages speakers the right to use their language within the justice system and the public administration, as well as the right to be assisted free of charge by interpreters and defenders who know their language and culture. Meanwhile, state authorities are required to ensure the

46 GÓMEZ VALENCIA (2000) 99.

47 MUELAS HURTADO (1991). On indigenous participation in the 1991 National Constituent Assembly, see ARIZA (2009) 246–260; LEMAITRE (2009) 134–144, 328–332.

48 The Colombian constitutional framework represents an example of the second cycle of constitutional reforms resulting from what has been called the "indigenous emergence in Latin America". See YRIGOYEN FAJARDO (2010); BENGEO (2007).

49 Article 1 of Law 1381 of 2010 defines "native languages" as those currently spoken by Colombian ethnic groups: indigenous peoples, Afro-descendant communities, the raizal community of San Andrés and Providencia islands, and Roma communities.

translation into native languages of laws, regulations, and policies related to ethnic groups, as well as the establishment of training programs for interpreters and officials in charge of providing services to ethnic groups.⁵⁰

This legislation has impacted the language of the state law in the legal, administrative, and judicial fields. The first attempt to bring linguistic diversity into the legal language was the translation of those excerpts of the 1991 Constitution related to the bill of rights and the rights of ethnic groups into indigenous languages.⁵¹ This experience tells us about the huge challenges of intercultural translation of legal texts, and the significance of the translation process itself, more so than its result, as a space for intercultural dialogue on the different concepts that shape indigenous and non-indigenous political and social worlds.⁵² Variations in the translation of the concept of ‘Constitution’ into the *Cubeo*, *Guambiano*, and *Nasa Yuwe* languages exemplify how linguistic differences involve idiosyncratic epistemes, historical experiences, and normativity ideas. The *Cubeos*, an Amazonian people, understand this concept as “the text /speech of the food tree of life”. For the *Guambianos*, a southwestern Andean people, ‘Constitution’ means “the major word written to be fulfilled.” Meanwhile, the *Nasa* (or *Paez*) people, also located in the southwestern Andean region, translate ‘Constitution’ as “*ikahsaecne’hwe*’s”, meaning “the leaf [book] of the main power”.⁵³

50 Articles 7, 8, and 21 Law 1381 of 2010.

51 In total, 40 out of the 420 articles (380 plus 60 transitory articles) that comprise the 1991 Constitution were translated into 7 out of the 65 Colombian indigenous languages.

52 For a balance of this experience, see LANDABURU (1997a and 1997b) published in a monographic issue that also includes articles authored by the indigenous linguists from the seven indigenous peoples who took part in this project.

53 As linguist Jon Landaburu explains, when compared with others, the Amazonian peoples most heavily resort to their own symbolism and knowledge to understand the Western world, since their experience facing colonization is more recent than the indigenous peoples of the Andean region. Hence, the translation of “Constitution” into the *Cubeo* language draws on a widespread Amazonian myth about the origin of food and social life. Meanwhile, the *Guambiano* and *Nasa Yuwe* translations convey more explicitly the notions of “written law” and “authority”, which are closer to the Western idea of “Constitution”. That said, there is a significative nuance between both translations. While the *Guambiano*’s carries the idea of legitimacy (“the major word”), the *Nasa Yuwe* translation (“the main power”) conveys an understanding of the state authority as a *de facto* power rather than an inherently legitimate one. Such a nuance makes sense when considered the more belligerent stance that *Nasa* people have historically adopted toward the colonial institutions when compared with the *Guambianos* and other Andean peoples. LANDABURU (1997b) 167–169.

Apart from this seminal attempt to bring linguistic diversity to the constitutional language, the Colombian Constitutional Court has taken some steps toward the protection of linguistic diversity in the administrative and judicial languages. In Decision T-384 of 1994, the Court enforced the co-official status of the *Curripaco* language in the department of Guainía (the population of which is 98.7 % indigenous) by striking down an administrative resolution that banned the broadcasting of radial political conferences in a language other than Castilian. In Decision T-760 of 2012, the Court protected the linguistic rights of a homeless *Embera-katio* couple who had been deprived of custody rights over their children by the Colombian Family Welfare Institute (ICBF). The parents could not take part in the administrative procedure, since all the notifications were delivered in Spanish even though the ICBF had evidence that they did not understand this language. Meanwhile, in Decision C-274 of 2013, the Constitutional Court ruled that institutions dealing with public information concerning ethnic communities must provide for translating the information into native languages.⁵⁴ Furthermore, in some cases involving indigenous peoples who do not speak Spanish, the Court ordered the translation of its decisions into their native languages.⁵⁵

The most consistent efforts to redress the discrimination arising from legal monolingualism have focused on the legislation and institutions resulting from Colombian society's attempt to end its internal armed conflict and to compensate its victims. Legislation on reparation for victims establishes that victims have the right to use their own language in all administrative and judicial procedures intended to make effective their rights to truth, justice, and reparation. The state must provide for reliable interpreters authorized by the respective indigenous community.⁵⁶ The right to use native languages and be assisted by a reliable interpreter still stands even if the member of the ethnic group has proficiency in Spanish.⁵⁷ Meanwhile,

54 Colombian Constitutional Court, Decision C-274 of 2013. Constitutional review of Article 8th of the bill on the right to access to public information (Law 1712 of 2014).

55 Colombian Constitutional Court, Decision T-129 of 2011 (on the right to prior consultation of two *Embera-katio* communities); A-173 of 2012 (on the rights of the *Jiw* and *Nükak* peoples).

56 See Articles 38, 115, 120, 122, and 176 of Law Decree 4633 of 2011, on integral reparation and restitution of territorial rights for indigenous victims of the armed conflict.

57 Colombian Land Restitution Courts recently enforced this provision in a case in which an *Embera* community claiming for land restitution presented a witness who testified in his

the implementation of the peace agreement signed by the Colombian government and the FARC-EP guerrilla group in 2016 has demonstrated the challenges of enforcing legal multilingualism in a post-conflict context. This experience also illustrates the strategic use of the legal framework on linguistic diversity in a deeply divided country still licking the wounds left by the armed conflict, as exemplified by two recent cases: the challenge to the 2016 plebiscite on the peace agreement by members of the Democratic Center (CD) party, and the right of protection filed by *Embera-dóbidá* communities from Bojayá.

In August 2016, the Colombian government called a plebiscite in order for citizens to decide whether to endorse or reject the peace agreement. A group of congresspeople from the Democratic Center (CD), a right-wing party opposed to the peace agreement, filed a lawsuit challenging the constitutionality of the Presidential Decree calling for the plebiscite. The plaintiffs argued that the government had failed to comply with the constitutional standard of protection of linguistic diversity, for the agreement had not been translated into all the native languages existing in the country, nor was it available in Braille. In Decision C-309 of 2017, the Constitutional Court ruled that the obligation to translate the peace agreement into all the country's native languages was a mandate of optimization, the satisfaction of which does not require full compliance, but rather the highest level of observance according to the factual and legal possibilities. The Court concluded that the government had complied with this mandate since a summary of the agreement was translated into 62 of 65 indigenous languages, and an audio version in Spanish was available for people with visual disabilities.⁵⁸

native language. The adversary of the indigenous community argued that the indigenous witness should not be allowed to testify in his native language because of his high proficiency in Spanish, as proved by the fact that the witness even has a Facebook account. The Court ruled that the right of indigenous peoples to use their native languages in courts is granted on the basis of cultural and linguistic diversity rather than of their lack of proficiency in the dominant language. Information about this case was provided by Laura Rojas Escobar, a former official of the Unidad de Restitución de Tierras (URT). See Tribunal Superior de Antioquia, Sala Civil Especializada en Restitución de Tierras, Sala Primera, Act No. 67, December 10th, 2018, case No. 270013121001-2014-00101-01, Comunidad indígena Embera – territorio Tanela.

- 58 Translations of the peace agreement into indigenous languages are available at this website: <http://www.altocomisionadoparalapaz.gov.co/herramientas/Paginas/acuerdo-lenguas-nativas/El-Acuerdo-de-Paz-se-habla-en-lenguas-nativas.aspx>.

The plebiscite was held on October 2nd, 2016, and the rejection of the peace agreement was carried by a tiny margin of about 54,000 votes.⁵⁹ While most of the “no” votes were cast in urban areas, the “yes” votes came from the peripheral and most impoverished regions of the country inhabited primarily by ethnic groups. Shortly thereafter, 32 communities belonging to the *Embera-dóbida* people from Bojayá (Chocó), along with Dejusticia, an NGO that actively endorsed the peace agreement, filed a writ of protection (*acción de tutela*). They sued for the protection of their rights to political participation and non-discrimination, which had been violated by the absence of polling stations in their settlements, and to remedy the lack of measures to facilitate the right to vote for members of their communities unable to speak Spanish. Such linguistic discrimination, they argue, has affected women disproportionately, most of whom speak only *Embera-dóbida*. In 2002, Bojayá suffered one of the worst massacres the FARC guerrilla committed during the armed conflict, leaving 120 killed and 98 wounded. The obstacles that the people of Bojayá faced to vote in the 2016 plebiscite thus raise a powerful question on the legitimacy of its results.⁶⁰ Moreover, this case entails a special challenge for the protection of linguistic diversity, for the *Embera-dóbida* language lacks an alphabet, which makes the translation of electoral materials more difficult. This *acción de tutela*, which was expected to become a leading case in linguistic reparative justice, was finally decided by the Colombian Constitutional Court in Decision T-245/2022.⁶¹

4 Conclusions

As the Castilian language carved out the Spanish empire during the colonial era, it became the primary instrument for nation building after independence, as well as the language of the state law in the postcolonial era. This monolingual legal tradition, albeit familiar to other Latin-American countries, stands in striking contrast to historical experiences of legal multilin-

59 The results of the 2016 Plebiscite were: 6,431,376 people voted *No* (50.21 %) and 6,377,482 people voted *Sí* (49.78 %).

60 On the impact of the armed conflict on Bojayá’s indigenous and afro-Colombian communities, see BELLO ALBARRACÍN (2010).

61 Among other provisions, the Court ordered electoral authorities to provide reliable translators for those members of the indigenous communities who require them. On the concept of “linguistic reparative justice”, see TODD (2013).

gualism in European and Eurasian states. Some cases in point are Austria-Cisleithania, a non-nation multi-ethnic state lacking a unified official language, and the Ottoman state, in which multilingual legal tradition remained even after the establishment of Ottoman-Turkish as the official language in 1876. Even the legal monolingualism of the Russian Empire, which did not preclude linguistic diversity at the regional and local levels of legislation, administration, and courts, contrasts against the outright monolingualism of Colombian state law. Differences in colonial-imperial legacies and processes of nation-state formation account for such contrasting trajectories in the embrace of linguistic diversity in the state legal sphere.

Even within such diverse trajectories, some coincidences in temporality reveal a shift from a somewhat open stance on religious and cultural diversity that prevailed in 19th-century liberalism toward the consolidation of centralist and culturally homogeneous nation-states from the 1880s onward. This common trend can be seen in the Russian, Turkish, and Colombian cases. As regards the latter, though the 19th-century liberal legislation formally provided for the study of indigenous languages in universities and schools for missionaries, this openness toward linguistic diversity did not upset the widespread legal and social monolingualism. This close link between Spanish-language, national identity, and political power became even stronger during the Conservative hegemony (1885–1930), when a generation of philologists-rulers envisioned a white, Catholic, and Spanish monolingual Colombia, painting Indians and Afro-Colombians out of the national picture. The surviving native languages were regarded as efficient tools for evangelization and Castilianization, subjects of scholarly research and state regulation, but by no means as languages worthy of being spoken in the state legal sphere.

Throughout the 19th and most of the 20th century, the state law worked as a powerful device for linguistic assimilation at a time when growing encroachment on indigenous lands sparked a drive for native literacy. Even so, the Spanish and legal languages were both devices of acculturation as well as arenas of contention and cultural translation that some literate *indígenas*, Quintín Lame being a case in point, used to resist colonization. These hegemonic languages, however, have also served as tools for blatant discrimination, as was proved by the issuing of identity cards with fake dates of birth and denigrating names for the *Wayuu* people by officials of the Colombian National Civil Registry. Despite monolingualism, linguistic diversity has

insinuated itself into the legal field through indigenous concepts that have crept into the language of criminal courts, and because of the myriad indigenous normative systems that run parallel to the official /state law. The rise of the *Indigenismo* in the 1930s and the subsequent shift from assimilation to ethno-development in the 1970s contributed significantly to advancing the knowledge of indigenous languages and planting the seed for bilingual education among indigenous communities.

The 1991 Constitution marked a formal turn from a monocultural and monolingual nation to one that embraces its ethnic and cultural diversity, giving native languages co-official status in the territories of their respective ethnic groups. The Colombian multicultural shift stands in sharp contrast against the case of Turkey, which, in the last decades, has experienced a setback in its multilinguistic tradition to push instead for cultural and linguistic uniformity and discrimination against Kurdish voices. By contrast, Colombian legislation has gone beyond the territorial factor set by the 1991 Constitution by enabling native-language speakers to communicate in their own languages with state authorities, not only within ethnic territories but nationwide.

The current legal framework formally opens the door for indigenous languages to become fully official in the administrative, legislative, and judicial spheres. Bringing linguistic diversity into Colombian legal languages, however, is particularly challenging in a country that has more than 65 native languages, some of which are lacking an alphabetic writing system, which complicates cultural translation in a legal culture dominated by writing. This difficulty paves the way for strategic uses of the legal framework on linguistic diversity, as exemplified by the lawsuits filed by the congresspeople of the right-wing Democratic Center (CD) party and the *Embera-dóbida* communities from Bojayá. It is apparent that both actors availed themselves of the lack of full compliance with the constitutional standard on linguistic diversity to make respective cases against the 2016 peace agreement, and against the results of the plebiscite that rejected it. Even so, there is a significant difference between both claims: while the former comes from a party that represents privileged strata of white and Spanish-speaking Colombian society, the latter comes from indigenous peoples who have borne the brunt of the armed conflict and linguistic discrimination.

Although efforts have been made to redress linguistic discrimination in the legal field, the main stumbling block in doing so is that ethnolinguistic

policies have been built upon the idea that “authorities must ensure that native languages do not become an obstacle for ethnic minorities”.⁶² Why not the other way around? To live up to the commitment of linguistic diversity, Spanish-speaking Colombians must overcome the cultural barriers that keep them apart from indigenous languages. The state law might take a step in that direction by creating strong incentives for officials to learn native languages, which, so far, has not been done. Moreover, bringing linguistic diversity into the language of the law is not just a matter of translating statutes, policies, and decisions produced by Spanish-speaking lawmakers and officials into indigenous linguistic codes. It requires the participation of indigenous people, with all their epistemic and normative diversity, in the everyday operations of the state legal sphere. It is a matter of cognitive justice and real intercultural dialogue, yet, if mere translation seems overwhelming, cognitive justice and intercultural dialogue pose a challenge that requires not just legal but cultural change.

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62 A common underlying premise that the Constitutional Court made explicit in Decision T-760 of 2012.

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Austria-Cisleithania – a Non-nation Multi-ethnic State and its Language Policy

1 The term *Nationalstaat* (nation-state)

What Lopera Mesa has reported about was the history of the language policy of a kind of state known in German as ‘Nationalstaat’/‘nation-state’. In the following, I would like to show the language policy of a non-nation multi-ethnic state. If we compare Colombia and Austria with regard to language policy, this exactly is the crux of the matter: The first was a national state, while the latter was the counterpart of a nation-state, which means a multi-ethnic state.

Indeed, I am dealing only with “Österreich-Cisleithanien”. Cisleithania was the western one of those two states which came into being in 1867, when the Empire of Austria was divided into two nearly independent parts: The Kingdom of Hungary (including Croatia and Transylvania) on the one hand and Cisleithania on the other, including all other parts of the former *Kaisertum Österreich* not belonging to Hungary. It was only the Cisleithanian half of the Austrian-Hungarian Monarchy that was considered a ‘Vielvölkerstaat’, whereas the Kingdom of Hungary, i. e. the eastern half, erected itself in a very strong way as a nation-state like most other states in Europe.

Some remarks about the term ‘Nationalstaat’ are indispensable here, since the meaning of this term is anything but clear.¹ That goes for the German term itself but even more for the English translation ‘nation-state’. The problem is that there is hardly a clear differentiation between ‘state’ and ‘nation’ in the English language. In English, both terms are very close to each other. To give any example: “National railways” are railways run by the state, ‘nationalizing’ an enterprise means that it is taken over by the state. In the German language, the difference between ‘state’ and ‘nation’ is much deeper than in English. In German, the term ‘nation’ is far away from any

1 STAUBER (2008).

state, but rather it means a group of people who define themselves as related by virtue of a common language, culture and history. Affiliation with a 'nation' is completely independent from any state-citizenship. On the other hand, the German term 'Nation' is close to the term 'Volk'. It is the term 'Nationalstaat' which connects 'Nation' and 'Volk' on the one side with the state on the other: A nation-state is a state, the identity of which is characterized and determined by the culture and the language of one nation. That said, 'nation-state' does not at all mean that it need be completely ethnically homogeneous. Ethnic and linguistic diversity in one state do not rule out its character as a nation-state. Even in a nation-state, there may well be minorities. The decisive points are whether and to which extent a nation is successful in asserting itself as a state-bearing nation and in imposing its own cultural identity on the state. This, of course, is, in the first place, a question of majority relations: usually the majority nation is also the state nation, so defining its language and cultural identity.

With this in mind, it cannot be surprising to read Colombia described as a nation-state even though a large number of different peoples with different languages live within its borders. Colombia was a nation-state with a clear national identity based on the Spanish language, which was the undisputed state language, and a Hispanic cultural heritage "without any traces of the racial, cultural, and linguistic background of indigenous peoples". The "paradigm shift from assimilationism toward multiculturalism", which Gloria Lopera-Mesa is reporting about, did not take place before the 1970s.

In contrast, Austria-Cisleithania was the exact opposite of a nation-state. None of the many nations inhabiting it was in the absolute majority. Although the Germans were the relatively strongest nation (1877: 36.2 %),² they represented only a minority compared with the totality of the Slavic nations. Cisleithania was a state without an ethnic majority; all citizens belonged to a minority, and none of them could regard Cisleithania as their own nation-state. In this sense, Austria-Hungary was truly unique in Europe, and it was accordingly marvelled at seven more in the political world, as completely unlike the type of nation state that seemed to prevail in Europe.

2 Czechs and Slovaks: 22.5 %; Ukrainian: 12.8 %; Polish people: 12.1 %; Slovenians: 5.6 %; "Israelites": 4.1 %. KANN (1964) 390.

In the 19th century, many people were rather sceptical and concerned about the future of the Austrian multi-national state. In contrast, today very often pure enthusiasm arises when speaking about the Austro-Hungarian Monarchy, which is often – rather rashly indeed – held up as a predecessor of the European Union in East-Central Europe. It is usually ignored here that Austria-Cisleithania struggled with problems that would not have arisen in the first place in a nation-state. Leaving aside the most elementary problem – integration – I shall focus on one point which is closely related to the problem of integration: language.

2 The problem of state language

As a consequence of its multi-ethnicity, Cisleithania was a state without a unitary state language,³ and was thus unique in Europe. To put it more clearly and comprehensibly, Cisleithania was a state where the actual and more-or-less generally accepted official language was increasingly discussed towards the end of the 19th century. In consequence, the “language dispute”, as it was known, grew into one of the most serious, not to say most dangerous, internal political problems of Austria in the last decades of the Monarchy,⁴ not least since it was extremely emotionalized.⁵ Indeed most German Austrians perceived it as a symptom of a dangerous disintegration of the state.

If we go back to the end of the 18th century, we find that the German language had, in fact, been something like the official language of administrative authorities and courts throughout the whole Austrian state.⁶ This went even for such Crown Lands as Bohemia and Galicia, where a uniform Czech or Polish official language had, in practice, existed in the 16th century, when these countries got apart of the Habsburg Monarchy.⁷ In particular in the Bohemian lands (Bohemia itself, Moravia and Silesia) the enforcement of a general German official language had been part of an absolutist policy of unification and centralization that created as a result the Austrian unified

3 STOURZH (1989) 257.

4 HASLINGER (2008) 81.

5 An impression from that gives HAMANN (1996).

6 STOURZH (1985) 84.

7 SCHAFFGOTSCH (1906) 371 f.

state in the course of the 18th century.⁸ Only in Hungary did the Habsburg state fail in its attempt to institute a unified and centralized state with a unifying German official language.⁹

On the other hand, however, the primacy of the German language was also the result of the fact that German was the language of education and culture throughout Central and Eastern Europe, and recognized as such by the Slavs and, to a large extent, the Hungarians, it had to be mastered as a sign of membership of the upper and educated classes. It was, so to say, the transnational lingua franca of all educated people in Central and Eastern Europe.¹⁰ Additionally, German was also the language of the imperial family. Only in the Mediterranean ex-Venetian Crown Lands (Venetia, Istria, Dalmatia¹¹ and Trieste) was there a special situation, since Italian had a very old tradition not only as the language of the social and political élites but also as an official language in the late medieval and early modern states of Italy.¹²

With the rise of Slavic national movements, however, the traditional out-of-hand acceptance of German as a state and administrative language began to fade. It became a symbol of German dominance and hegemony over the Slavs, in clear contradiction to the principle of equality of nationalities, which, historically, had been closely associated with constitutionalism in Austria. This is not least evident in the fact that this principle had been included in all constitutional texts since the “Kremsierer Draft”, especially prominent in the “December Constitution” of 1867.¹³ Article 19 *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*, affirmed that the “equality of nationalities” was guaranteed, and, accordingly, every nationality had “an inviolable right to preserve and maintain their nationality and language”. The same provision explicitly affirmed “equality of all national languages in schools, ministries and public life”. However “equality of nationalities” meant, of course, equality of languages and thus the tradi-

8 HASLINGER (2008) 82–86.

9 HASLINGER (2008) 88.

10 SUTTER (1980) 154; HASLINGER (2008) 92.

11 On the language dispute in Dalmatia: KALWODA (2017).

12 STOURZH (1985) 84.

13 STOURZH (1989).

tional primacy of the German language was already being challenged. In response, the Germans sought to secure the traditional primacy of their language by way of (constitutional) legal stipulation. The issue reared its head for the first time at the preliminary stage of drafting the December Constitution of 1867, when the German Liberals tried to establish the role of the Germans as the 'ruling nation' in Cisleithania¹⁴ It was in this context that the first initiatives arose to amend the December-Constitution with a regulation that would fix the German language as the state language of Cisleithania.¹⁵ The representatives of the German Liberal Party proclaimed German as the state language, arguing that every civilized state would require a unifying state language. Otherwise, the "state would be dissolved into atoms". From the perspective of the German Liberals, it seemed to be evident that only the German language could be considered as the state language of Austria-Cisleithania, since German was the "most advanced language", the "language of a highly civilized people of 40 million" and, last but not least, it was the "language of the Dynasty".¹⁶ As is well known, this attempt failed because of the resistance of the Slavic nations within Austria. The same thing happened with the numerous later initiatives to define German as the official state language of Austria-Cisleithania:¹⁷ Under the terms of constitutionalism, the state was not able to enforce a consensus-based norm that brought even one single language close to the character of an official state language.¹⁸

3 "Law of languages" in Austria-Cisleithania: sources

Instead of arranging an official state language, in Austria-Cisleithania extensive efforts were made to practise an uncompromising language policy. As a result of this policy, a substantively and spatially highly differentiated Language Law was developed. It was spatially differentiated, since it developed very differently from province to province and, for that matter, from town to town.¹⁹ It came, accordingly, from very different sources of law.

14 RUMPLER (1997) 409.

15 STOURZH (1989) 250.

16 Quotation by STOURZH (1985) 85.

17 ABLEITINGER (1973).

18 STOURZH (1985) 87 ff.

19 FISCHER (1901).

In Austria-Cisleithania, it was not only the state that had the competence to enact statutes but also the Crown Lands (Länder), which could approve statutes in their own diets, the *Landtage*. Though Cisleithania had not the structure of a Federal State in a formal sense, it was very similar to this kind of state. In any event, the Crown Lands had the character of autonomous provinces, which could regulate the affairs of self-government by legislation passed by their own provincial diets.²⁰ Additionally, local communities could regulate local affairs, since they, too, had competence for self-government.²¹

Since general regulations with validity in the Cisleithanian state as a whole were hardly enforceable, the Austrian language law developed in a very different way in each province depending on its ethnic composition. As a result, the statutes enacted by the diets of the autonomous provinces were at least as important as those of the state itself.²² Equally important, however, were the regulations issued by cities and other communities, as disputes over local language use were often decided by municipal councils. The language to be used in council meetings, in official local administrative functions or by public-transport services was regularly defined and laid down by the local authorities, since these points were considered to be under their jurisdiction. In any event, most statutes enacted by the state itself had a limited range of application (i. e. the validity was restricted to a single province). Apart from Article 19 of the *Staatsgrundgesetz*, general regulations applicable throughout Cisleithania were the absolute exception.

The decisive source of legal regulation concerning language disputes was, however, not the legislation, but rather the legal system. In 1867, the Cisleithanian Constitutional Court (Reichsgericht) was established as a court with the competency, among others, of ruling on alleged fundamental-rights violations. A few years later in 1876, the Administrative Court (Verwaltungsgerichtshof) was established. In these two courts, citizens in Cisleithania could claim their fundamental right to linguistic equality, as guaranteed in the *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* as a part of the December Constitution of 1867. The Austrian Constitutional Court was the first court in which citizens could have a case heard concerning a per-

20 HELBLING (2003) 243 ff.; BRAUNEDER (2012) 75.

21 URBANITSCH (2000).

22 VILFAN (1970) 5.

ceived violation of their fundamental rights and which justified its decisions directly in terms of fundamental rights, making it, in this way, the first institutionally independent court of its kind. An analysis of the jurisdiction of this court shows that, in the vast majority of cases, the court had to deal with claims concerning language equality, far more often than with cases brought over classic fundamental rights of freedom and property,²³ With the result that the decisions of these two courts became a much more important legal source regarding language law than the statutory legislation of political bodies such as provincial diets and municipal councils. As a predominantly important source of legal norms on language use, the Constitutional Court and the Supreme Administrative Court contributed decisively to the juridification of the ‘nationality dispute’.

4 Objects of regulation

Concerning the Austrian language dispute, the most important and, at the same time, apolitical and very delicate objects of regulation were situated in two areas: Firstly, there was the problem of the state language regarding each of the three state powers, i. e. the state language regarding legislation, administration and jurisdiction. Secondly, and no less delicate, was the language problem concerning the education system: Which languages should be taught to which students in the different types of schools? The latter alone could be used to produce a hefty tome. In the following, I should like to draw attention to a few aspects of the ‘state language’ in the narrower sense, namely the language of legislation and administration:

In the area of legislation, two language questions had to be clarified: Firstly, there was the language of negotiation, that is, the language in which the parliamentary debates should take place. That means: which languages should be used in the parliament of the Cisleithanian state, the *Reichsrat*, and which in the diets of the Crown Lands²⁴ and, beyond that, the municipal councils. On the other hand, it was about the language in which the statutes would be published. This, of course, had to be regulated again separately

23 STOURZH (1985) 11.

24 On the language disputes in the diets of the Crown Lands: RAHTEN (2000) 1745 ff.; KRAHWINKLER (2000) 1873 ff.; BUCZYNSKI (2000) 1968 ff.; MALÍŘ (2000) 2068.

regarding the statutes of the state, statutes of the diets in the Crown- Lands and last, but not least, the municipal ordinances.²⁵

Even more sensitive and likely to lead to conflict was the question of the administrative language and the language used in the courts, since the daily life of the people was thereby affected much more heavily and directly. This also concerned the issue of the language qualifications of the officials: In which provinces and areas should the excellent command of which languages be a precondition for employment in the civil service? This was also a matter of resource distribution: How should the not very well salaried but secure jobs in the civil service be distributed among the various nationalities?

All this turned out to be a very difficult task. On the one hand, the state had to take into account that all nations represented in Austria wanted to be able to communicate with the administration in their own language. Additionally, the state had, of course, to take care in its own interest to ensure that its statutes and decrees were understood by all the emperor's subjects because this was the indispensable precondition for an effective implementation of those same statutes. It was therefore self-evident in every respect that all functionaries of the state on the lower administrative level should be able to make themselves understood by the citizens. On the other hand, however, the state also had to ensure a minimum of linguistic unity within the administrative apparatus so that inter-agency communication could be carried out without great difficulties. The latter is still the indispensable condition for an efficient centrally managed administrative organization.

A way out of this dilemma was sought through the regulative differentiation between "external", "internal" and "innermost" official language.²⁶ The "external official language" was the language which could or should be expected to be used by the citizens in communicating with the competent authority. It was the language in which they could make written submissions and in which they were informed about the decisions of the authorities. The "internal official language", on the other hand, was the language within the administration, with the exception, however, of communications between the central authorities and the subordinate authorities. For central communication processes, the "innermost official language" had to be used. This

25 STOURZH (1985) 92 f.

26 STOURZH (1985) 100 ff.; SCHAFFGOTSCH (1906) 371ff.

example may indicate the extent of the normative differentiation of the Cisleithanian legal norms regulating the use of language concerning only the official language. The differentiation was further increased by the fact that there were no uniform nationwide rules for the “internal language” of the authorities. Instead, the rules varied in detail from Crown Land to Crown Land. By contrast, the “external language” of the authorities was at least in principle uniformly regulated on the constitutional level by the above-mentioned guarantee of “equal rights for all customary languages in schools, public offices and public life”. With regard to the “external language” of the authorities, this led to the legal conclusion that every Austrian citizen had the right to communicate with the authorities in his own language, insofar as this language was “customary” at the respective seat of the authority. This did not, however, provide much clarity because it immediately led to the question of which language was “customary” in which parts of a particular area. As an example, it could be asked to what extent were German and Czech “customary” in Bohemia or Moravia. Would that be, moreover, in the whole of Bohemia or only in the respective German- or Czech-speaking areas?²⁷ What, then, about the transition zones between the Czech- and German-language areas? It was undoubtedly in Bohemia that the language dispute was most bitter and vehement, and the Cisleithanian state issued a whole set of language regulations in an attempt to regulate the issue, but nearly all of them faced great resistance from either the Czech or the German side because, by one side or the other every regulation was viewed as a modification of the status quo to the detriment of one or of the other.²⁸

5 The role of autonomous provinces (crown lands / *Länder*) and local communities in the dispute over languages

The Cisleithanian state was, in fact, honestly trying to defuse the national language conflict, but this was a demanding task indeed. For starters, there was the very number of languages concerned, being at least eight main tongues: German, Czech, Polish, Ukrainian, Slovenian, Croatian, Italian and Hungarian. Then, there was the fact that the state, the autonomous Crown Lands and the local communities did not pull on the same end of

27 STOURZH (1985) 120.

28 SUTTER (1960/1965).

the rope. On the contrary, they frequently worked directly against each other. Whereas the Cisleithanian state sought to operate as an “honest broker” for the nations,²⁹ the provincial diets and to a no lesser extent the communities contributed to aggravating the language dispute. They often sought to enshrine the absolute rule of the language spoken by the respective majority in the city. This routinely went hand in hand with endeavouring to displace the minority languages from the public space. The communities were not infrequently the biggest culprits in this regard.³⁰ It is worth noting that they were relying here not only on their right of self-government but also on the relevant provision in the December Constitution (Art. 19 *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*), claiming a “right to national self-determination” as individuals. This often resulted in no-exceptions community language policies rigid to the point of banning any inscriptions in the public sphere (even on tombstones!) written in a language of a national minority.³¹ A large number of cases that came to the courts of public law in Austria-Cisleithania, the *Reichsgericht* and the Administrative Court, dealt with language disputes between citizens and their municipal authorities because of the language policy of the latter. The Cisleithanian state could hardly intervene in this kind of conflict because legal control of the communities was not an affair of the state, but rather of the autonomous provinces in old Austria. That said, the *Länder* often did nothing to deescalate the language disputes in the communities. On the contrary, if the same nationality had the majority in the provincial diet as well as in the representative body of the respective community, the *Länder* regularly supported the aggressive language policy of the communities. It was, as a result, mainly the jurisdiction of the *Reichsgericht* and Administrative Court, when it came to protecting the national minorities in the communities.

29 STOURZH (1985) 27.

30 HASLINGER (2008) 105.

31 STOURZH (1985) 68.

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From Pragmatic Overtness to Legal Taxonomy of Equality. Ottoman-Turkish Perspectives on Colombian Linguistic Diversity and Law

“Spanish has been the language of law in Colombia or, to be precise, the language of the state law.” With these words, Lopera’s very interesting paper raises the main questions at the core of the relationship between linguistic diversity and law. It suggests first that the power games linked to the domination of a language over another developed, in the Colombian case, in a colonial context. Second, it triggers several questions around the concept and scope of state. What is the state? What is state law? It also raises the issue of the latitude of the state legal language: Is it the language that is spoken by all citizens of a country? Is it the language that the state uses in its official correspondence and documents? Is the language spoken among the state officials or used in their interrelations with the users of public services, or is it a language that the government imposes on a population, no matter its diversity? Thirdly and finally, in examining Lopera’s paper through the diversity analytical prism beyond time and space, we shall consider to what extent diversity is a contemporary notion and concern.

For comparative purposes, this paper will attempt to discuss these questions from the Ottoman and Turkish perspectives, underlying the peculiarities of the latter’s legal framework and expressions of linguistic diversity. This task can seem very challenging, as the geographies, histories, cultures, and languages of Colombia and Turkey appear to be irreconcilably different. The same applies to the evolution of law with regard to linguistic diversity, as the Colombians have apparently committed more significantly to multiculturalism.

When, however, subjected to closer scrutiny, it is fascinating to observe some striking similarities between the two countries’ legal evolutions with regard to language diversity, especially in the globalization’s dynamics from the 19th through the 21st century,¹ which the chronology *stricto sensu* hides

1 On the globalization of legal thought, see e. g. KENNEDY (2006).

in the first place because of asymmetrical but doggedly similar features. The paper thus intends to tackle the comparison of the two areas within a bigger picture driving the domination of homogeneous standards in both cases, despite the very different types of political sovereignties, each carrying its own social structure, and legal philosophy, as well as a political project (part 1). Stating that the state language issue crystalized around the idea of the national state, the paper aims also to understand how linguistic diversity tried to circumvent this rigid framework to find its legal way, even though the struggle is far from over (part 2).

1 Diversity of states, diversity of policies on linguistic diversity

1.1 The authorities of the linguistic diversity configuration: the march toward uniformity (19th to mid-20th century)

1.1.1 *Linguistic diversity as horizontal legal management*

When getting acquainted with Colombian linguistic diversity through the lines of Lopera, the most striking difference with the Ottoman case one can observe is its legal framework of the early 19th century. Linguistic diversity was then a fact on the ground but not an issue. As such, it was neither pointed out as diverse nor specifically legally addressed. However, the paper being limited to a time window that starts with the Colombian Republican era, it would be unwise simply to point out possible differences on legal practices without underlining another major difference, namely imperial political sovereignty. Multi-confessional, multi-ethnic and multilingual, the vast Ottoman Empire followed the Roman-Byzantine footsteps as well as the rules and spirit of Islamic law. It thus allowed a well-known legal pluralism, called the *dhimmi* system,² to become the *millet* system in the 19th century. If this legal pluralism is precisely the sign of a majority and dominant population, namely able to assert their rights as the ‘heterochthone’ Turkish-Muslim group, the large legal and administrative autonomy

2 The *dhimmis* (literally ‘protected people’), i.e. the People of the Book, are the Christian, Jewish, or Sabian subjects of the Ottoman sultan (or Islamic state) members, of whom the rights, own laws and autonomous management are protected together with restrictions and a mandatory head tax (*djizya*).

it allowed despite the discriminations can, however, not be comparable with the colonial situation of the Colombian case. It seems, however, that this hierarchical approach in Ottoman social diversity did not concern the linguistic sphere, as the linguistic diversity could transcend the reserved normative areas before being loaded with a heavy political burden by the end of the century.

Ensuring legal and linguistic pluralism was a norm that did not come out of a so-called tolerance or openness towards minorities. This mere understanding would arguably be an anachronistic analysis. It was, rather, a statement of the various compositions of the Empire's populations. The Ottoman Empire had a very pragmatic approach to its diplomatic and internal relations. 'Diversity' was perceived neither as an issue nor as the counterpart of the equality principle. In line with Islamic political philosophy, it rather was a means of management of the wide imperial territory, which aimed to ensure a more fluid and efficient functioning of local institutions while avoiding discontent or unrest. This horizontal management is a shared feature among empires.³ The Ottoman policy on languages developed within this framework, embracing the great variety of its population, of whom 35 to 40 per cent commonly spoke Ottoman-Turkish by the mid-19th century, especially in the palace, among the head of state and military personnel, while some regions, such as the Arab or Aegean provinces largely dismissed it.

Along with records in Ottoman-Turkish, the Ottoman archives abound with official documents written in diverse languages of the Empire such as Greek, Armenian, Arabic, Persian, or Bulgarian. Moreover, this multilingualism reflects not only the societal, but, also the legal and official state spheres. The Ottoman legal production and official notifications adapted in order to suit the targeted region better, which explains, for example, the amount of untranslated correspondence with the officials in Arabic-speaking Ottoman provinces. Likewise, official publications, such as the yearbooks reporting government, ministry, and provincial activities on different topics (*salnâme-ler*) as well the Official Journal (*Takvim-i Vekâyî*), were published in many different languages, such as Arabic, Persian, Greek, and Armenian, or in French, the latter becoming the elite's language as well as a window on

3 MANTRAN (1993); BURBANK (2004); JACKSON (2006); DUINDAM et al. (eds.) (2013).

Europe in the 19th century. From the legal standpoint, we shall underline that the Ottoman Edicts, laws and regulations, such as the first Civil Code, the *Mecelle*, were all translated into the various languages of the diverse populations of the vast Empire from Bulgaria to Yemen. Diversity, however, was not only mirrored in translations. Quite unique for its time, the very normative production of the non-Muslim minorities, i.e. their state recognized the right of law making, was carried out in their own languages, such as the Regulation of the Armenian Nation (*Nizâmnâme-i Millet-i Ermeniyân*) in 1863 written by Armenians in Armenian.

Beyond official production and communication, multilingualism was also the norm in administrative and judicial functioning within the Empire. Unlike in the young Republic of Colombia, where Spanish, as a colonial residue, was the only recognized official state language despite the acknowledgment of the diversity of languages, in the 19th-century Ottoman Empire, petitions, complains or legal actions were accepted no matter the language. Consequently, translators were very common figures in official institutions. Expanding access to justice and self-expression for local populations seemed, in terms of assessing any given office's operations, to have been more highly valued than a mandatory knowledge of their specific language by local authorities.⁴ That said, in reality, the local officials often spoke at least two languages. For instance, the governor of the *Eyâlet-i Budin* (Province of Budin) could speak both Hungarian and Ottoman-Turkish fluently.

Following the same pattern of autonomous and efficient functioning of local administrations, it was not rare to run an official institution, or an Ottoman court in a language other than Ottoman-Turkish – whether in the oral part of the procedure, like observed in the Balkans since the rolling judges often ignored the local languages, or entirely as demonstrated by the written Arabic-language court records in Arabic-speaking provinces. The community courts (i.e. Armenian, Greek, or Jewish own autonomous courts) were also free to use their language on top of being able to apply their own canonical laws. In mixed courts dealing with litigation between Ottomans and foreigners, French (and Arabic in the relevant provinces) was quickly approved as a second official language in the 19th century. Equally,

4 This use of multilingualism before Ottoman tribunals was eagerly reported by Alishan, a famous interpreter of the British missions: The National Archives of the UK, Kew, FO 78/1758, 27 November 1862.

documents written in French served as a valid proof even without being translated into Ottoman-Turkish. Sometimes, their rulings written in Ottoman-Turkish were even overturned on the basis that the plaintiff did not know the language.⁵ Interestingly enough, the language not found in the courts was Turkish itself, namely the Turkish without Arabic and Persian borrowings spoken by local Anatolian peasants, which was an additional reason for their wariness towards the courts, as Ottoman-Turkish was difficult to understand for many of them and perceived as the language of the élite. However, the general practice of multilingualism contributed to an efficient and autonomous horizontal system of ruling until the last decades of the 19th century.

Ottomans then underwent a shift in their approach of multilingualism towards an understanding close to the Colombian one. Language slowly became linked to its political dimension with the ascension of the nation-state and claims to equality, both diametrically opposed to Ottoman imperial political sovereignty and organization.

1.1.2 Elites and colonial narratives, vertical law making

In her paper, Lopera stresses that, after Independence in 1819, “Colombian political and intellectual elites enthusiastically embraced Spanish grammar as a key element of nation building as well as a ‘civilizing’ tool that would shape good citizens and rulers [...]”. Obviously, the Ottoman Empire had never known a legal form of colonialism, nor did the idea of nation-state become concrete before the very end of the 19th century. The civilizational narratives linked to European standards did, however, start to spread across the Empire – and around the world – mostly through the Ottoman elites, who followed closely the paradigmatic shifts of international relations that supported and legitimized this political concept. In other words, if the uniformization of the state language occurred much later in the Ottoman-Turkish area, the framework and paths toward it were strikingly similar.

Lopera points out that Spanish became the language of decisional spheres, following standards set for Spanish American countries by the philologist and lawyer Andres Bello in the mid-19th century. Noteworthy is the

5 Turkish Presidency State Archives of the Republic of Turkey: DAB.O, HR.TO., 41/117, 1889.

fact that Bello has also very much contributed to the spread of international law on the continent.⁶ That humanist was won over by the ongoing universalist and positivist paradigmatic shifts in international law, namely in European public law, as it was then called. Its holism and legal standards intrinsically created and excluded the *other*, whose emulating assimilation was expected for entry among the civilized nations.⁷ The Ottoman Empire had also been affected by these evolutions, as new international legal standards categorized it as “semi-civilized”,⁸ needing reforms in order to be recognized as a sovereign state.⁹ With that said and contrary to the case of Colombian, whose colonial past gave an immediate priority to the language of the dominant power, civilizational narratives had an impact on the linguistic sphere much later than the institutional, industrial or literary ones. For example, before a linguistic uniformization,¹⁰ the reforms led to a legal centralization that slowly condemned the diversity of sources of law and of conflict resolutions. In line with the legal positivist trends, customary law and mediation (*sulh*), for example, were heavily criticized as being uncivilized – which did not, however, make them disappear overnight.¹¹ Because it affected mostly spoken legal traditions, especially in areas where trials were held outside the ordinary courts, the process may, however, have had an indirect impact on local languages.

Another important difference related to the civilizing missions is the role of religious authorities. Contrary to the very active role of the Church in an assimilating education and, paradoxically, in the survival of the languages of the natives, the Islamic authorities did not play a role in the normalization of the Ottoman-Turkish language as the official state language. Such a mission could not be connected to any proselytizing purposes similar to the Church’s in Colombia, as the language of Islam was firstly regarded as Arabic, which was not the language of the dominant power. However, if not via the religious institutions, the narratives and assimilationist paradigms also affected education in the Ottoman Empire.

6 KELLER-KEMMERER (2018).

7 See e.g. ANGHIE (2005); KAYAOĞLU (2010); LORCA (2010).

8 LORIMER (1883).

9 KAYAOĞLU (2010); LORCA (2010); MUSLU (to be published).

10 The exclusivity of Turkish-Ottoman in the courts has been generalized from 1908 on. See e.g. The National Archives of the UK, Kew, FO 195/2332, no. 64 to 66, 14 July 1909.

11 See e.g. DERİNGİL (2003); TÜRESAY (2013).

In the 19th century, education seemed to have indeed been an assimilation tool shared with colonial republican powers such as Colombia on the basis of both the principle of equality and a *mission civilisatrice*. One of the most significant examples is the model of the free and public school of French republicanism driven by Jules Ferry, assuring the assimilation of diverse elements of society within France and in the colonies.¹² The language of the dominant power, e. g. Castilian in Colombia, was imposed as the language of culture, of the modern and civilized. This also involved the establishment of elite power spheres, such as legal education. Again, in the Ottoman Empire, this pattern was also evident by the end of the century.

Before the Tanzimat period (1839–1876),¹³ legal staff was trained mostly in *ulema* schools. At the same time, the highest state offices working for the Inner Service of the Porte, often filled by select young Christian boys from the *devşirme* system, received comprehensive training in the palace school (*Enderûn mektebi*) that included Islamic sciences, law, and languages, chiefly Ottoman-Turkish, Arabic and Persian. In the meantime, however, especially from the reforms period onward, this legal linguistic diversity left room for French and positive laws, which were the core of newly formed universities and legal instruction.¹⁴ The same applied to the Translation Office of the Sublime Porte (*Tercüme odası*) attached to the Ministry of Foreign Affairs. Created in the late 19th century in line with the model of the French *École des jeunes de langue*, which trained translators in Oriental languages, this Office has become a breeding ground for Ottoman senior officials. The spread of French as the language of diplomacy and elites did not, however, make it the state language, the way Spanish had become in Colombia. The Ottoman Empire had no official colonial bond with European Powers. Nevertheless, Ottoman-Turkish eventually stood out as the state law by the end of the 19th century, when the concept of nation became more concrete to the Ottomans.¹⁵ This time lag does not show a fundamental difference between Colombia and the Ottoman Empire. It reveals instead a substantial

12 LUIZARD (2006).

13 A deep administrative and legal reform process, which is often described as the ‘modernization process’ of the Empire.

14 AKYILDIZ (1993); DAVISON (1999).

15 ‘Nation’ is here understood as nation-state not nation as *gens*, which was the very core of Ottoman administrative and legal organization based on a *millet* (i. e. nation) system.

common factor of the imposition of an official state language, namely the spread of the nation-state, such that in both places, the language of the dominants took over, legitimized by civilizing narratives and, as Lopera underlines, as “a key element of nation building”.

1.2 Monomania of the nation-state and assimilationist equality

1.2.1 *The constitutional turn: transitional period toward uniformization*

The Imperial Reform Edict (*Islâbat Hatt-i Hümayûnu*) of 1856 enshrining equality in education, administration of justice, and taxes for all Ottoman subjects regardless of creed is among the most significant steps in Ottoman constitutional history. The first constitution, the *Kânûn-ı Esâsî*, was adopted along the same lines in 1876 as the concluding act of decades of reforms. Even though it was suspended two years later by the Sultan Abdul Hamid until 1908, the parliamentarism and idea of the nation-state as political unity – and mystified uniformity – over a territory,¹⁶ made their way through the Empire, widening the familiarity and aspiration for principles of freedom and equality in the public spheres. But these ideas came within the framework of the Islamic philosophy, which refers to the political and religious communities rather than to individuals.¹⁷ This often led to important misinterpretations of the ‘modern’ constitutional thought. More than just Islamic, this perception is also an imperial one. It considers nationality through the prism of *gens* rather than of the modern understanding of nation, each group of people being linked to a language, as provided by the ‘universalized’ constitutional right of equality.¹⁸ These mixed perceptions engaged the Ottoman Empire in a transitional period leading toward the uniformization of the state language, while keeping each community’s own language: A duality, or a mild homogenization process that resembles

16 It is worth underlining that, if the idea of nation state can already be read between the lines of the Fundamental Law of 1876, until the last decade of the 19th century – if not later – the very concepts of nation or nationalism remained very abstract to most Ottoman officials, who believed in and worked for the survival of the Empire, as a political form.

17 PICAUDOU (2005).

18 This also seems to coincide with the ‘December Constitution’ of 1867, which gave “all nationalities of the state” of Cisleithania the right to preserve their “nationality and language”.

the early Republican era in Colombia, where a strong idea of nation-state was not yet predominant.

As mentioned above, the penetration of the nation-state concept came within a global framework of universal paradigm, which contributed heavily to the shift of the Ottoman understanding of equality. From the right of each political community to be recognized and protected by the sultan, the prevailing universality slowly urged homogenizing equality, where diverse beliefs and histories were erased for the sake of a uniform national identity. This understanding of equality as ‘equity-equality’, which is rather arithmetical in an Aristotelian interpretation, is not compatible with an imperial political structure and its legal pluralism, which would rather refer to an ‘equity-*aequitas*’, the way it is understood nowadays under the trend of ‘diversity’. It is also not attuned with the very concept of identity that is constantly in movement *per se*, as equality in a strict sense implies assimilation processes in order to meet the standard criteria of national – civilized – identity, set by the dominant decisional spheres.

Both in Colombia and in the Ottoman Empire, the legal expression and acknowledgment of the need for a homogenization under the equality paradigm was embodied by the constitution, which expresses the general will of which the State – along with its official language – is considered to be the sole vehicle. It enshrines a single language for the state becoming a nation that accordingly denied all others as a threat for unity or as unworthy of a civilized country. The turning point of the linguistic diversity in the Empire was probably initiated by article 18 of the first Ottoman Fundamental Law (1876), which established Ottoman-Turkish as the official language of the Ottoman state (*devletin lisan-ı resmîsi*), thus introducing an official monolingualism incompatible with a multi-cultural empire, as Castilian monolingualism did in Colombia.

“Official language” at that time, however, was not understood as it commonly is today. It did not target the population of the Empire yet, but it intended to establish a harmonization of the language of state officials without forbidding any other language of the Empire. Even so, it was very much understood by many of its contemporaries as a factor of polarization rather than the targeted so-called unity,¹⁹ because it felt as stigmatizing. It urged

19 Among the most virulent opponents, we can mention Eğinli Said Pasha, an Ottoman politician and grand vizier (*vazîr-i a'zam*): ALTIN (2018).

every state official to learn Ottoman-Turkish, as the president of the Assembly Ahmed Vefik Pasha expressly advised the Arabic-speaking members. The uniformization of the official language did not, however, find an immediate implementation and certainly not in the legal production and communication. The first Ottoman civil code, the *Mecelle* (1869–1876), for instance, had been published in the different languages where it was adopted, from Bulgaria to Palestine or to Yemen, but, the uniformization momentum had been created and was growing in its wake. It is of note that this is around the same period when Colombia consolidated its monocultural nation-state, especially *via* its constitution of 1886, which gave no room for diversity.

The constitution, as a normative source, does not, of course, carry the idea of uniformity, but it can jeopardize diversity when it enshrines the idea of republicanism in a Jacobin understanding, rejecting or denying ‘minorities’ – who may, admittedly, be considered as the equivalent of indigenous peoples in the Ottoman context.²⁰ This is even more so, when it is supported by universal exclusive principles within a territory legitimized by the uniform identity of its population. If the Turkish Republic was born in 1923, from 1908 on, the path toward a rigorous homogenization of the population of the Empire – and so the language – was already firmly underway.

The Young Turks, a heterogeneous group of liberal intellectuals and revolutionaries opposed to the sultan’s authoritarianism, obtained the reestablishment of the suspended Fundamental Law in 1908. They reinterpreted article 18 along their own trends, such as positivism, republicanism and militarism, contrary to the Colombian case. The official language was henceforth addressed as the sole and mandatory language that came with a ban of using other languages for official correspondence, reports or any documents, including even a stamp with a language other than Ottoman-Turkish. This interpretation led to important debates in the parliament, calling for the continuation of linguistic diversity in debates, and publication of laws, as the duty of the state is to explain the laws to its entire population.

20 The author acknowledges that ‘minorities’ are a posterior legal category, that stems from the post WWI context. The choice of this generic terminology is in no way motivated by an the Intension of confusion but by mere convenience.

1.2.2 *The consolidation of a single state language as rigorous policy*

The understanding of what the official language of the Turkish Republic is, as confirmed in the Turkish constitution of 1924 (and now of 1982), is a direct legacy of the Young Turks' interpretation. Nationalism that started at the very end of the Empire definitely anchored with the Kemalist doctrine, of which it is one of the six ruling principles, to become an unfailing component of the Turkish political landscape in the 20th century. Mustafa Kemal used nationalism as early as in the 1920s to consolidate and merge the territory and Anatolian populations left from the dislocation of the Empire around an indivisible country, mythic history and an *a posteriori* reconstructed Turkish language, of which the alphabet had been Latinized. These radical reforms took place within a shared authoritarian global context, which may explain the concordance with the strength of the Colombian monolingual policies.

Nationalism in the new Turkish Republic, which propagated a symbiosis between Turkish ethnicity and Sunni Islam,²¹ was strictly unifying, going even beyond the nation-state borders to reach Turan in Central Asia. As a consequence, the many ethnic and religious groups outside this Turkish-Sunni symbiosis in Turkey, such as Armenians, Assyrians, Alevi, Arabs, Circassians, Greeks, Kurds, Laz, or Zaza, had to be homogenized by different means: Mere ignorance (e.g. Alevi were long ignored in the official historiography²²), cleansings (extermination, exile, exchange of populations, etc., during the First World War and the beginning of the Turkish Republic) or assimilation policies, that mostly targeted Alevi and Kurds,²³ the latter being named in line with the colonial narratives of "the Turks of the mountains".

21 Sunni Islam, sometimes referred to as "orthodox Islam", and Shia Islam are the two components of the main schism in Islam since the battle of Siffin in 657, the first being the largest denomination of Islam.

22 The Alevi are a heterogeneous, heterodox, and syncretic religious community of Shiite inspiration who have been subjected to persecution for heresy since the 15th century, before being lastingly stigmatized as internal enemies. They are generally estimated to be around 15 to 20 million people in the Turkey of today. Though embracing several ethnic groups, the Alevi are a religious community and as such, they are not the first target of this paper, which focuses on linguistic diversity.

23 With 12 to 15 million Kurds, Turkey has the most important Kurdish community in the entire Western Asia.

From patriotism in the context of an independence war in the beginning of the 1920s, Turkish nationalism shifted toward a narrow chauvinism, radical and militarized, which was supported in the following years by normative behaviours and discourses, the flag, education, and the myth of pure blood. A legislation, the Act of Unification of Education (*Tevhîd-i Tedrîsât Kanunu*), banned in 1924 the teaching of any other language than Turkish in the formal education system. The Turkification process did not only result in state supervision. Galvanized by the new independent secular Republic, a self-proclaimed missionary elite, mostly composed of intellectuals, doctors, or students, assumed a role of national homogenization by guiding their ignorant and uncivilized fellow citizens, condemning the use of non-Turkish languages and ostracizing their speakers.²⁴ In line with this, “Citizen, speak Turkish!” campaigns, for example, were run by local and national newspapers.²⁵

Official monolingualism is a defining characteristic of the 20th-century nation-states, which, in the case of Colombia, slowly became milder with measures in favour of more diversity only in the last decades of the century, and more significantly from the 1990s onward, when Turkey engaged in a process of authoritarianism. The Turkish shift toward institutionalized discrimination was also reflected in laws, which went through a racialization process and created a legal framework for the criminalization of diversity for the sake of Turkish identity. Turkish identity is sacralized, with any offence to it criminalized, so that diversity – including linguistic²⁶ – is actually denigrated or forbidden. Thus, article 301 of the Penal code, which condemns “injury to Turkishness” allowed the indictment of many intellectuals, such as the Nobel Laureate Orhan Pamuk and the journalist Hrant Dink.²⁷ In 2008, this article was amended: The vague “Turkishness” was replaced by the not much clearer “Turkish nation”. The Turkish language is still very central in the collective imagination, still haunted by the trauma of treason and loss

24 “Vatandaş Gözün aydın”, *Hizmet*, 30 January 1928.

25 “Vatandaş Türkçe konuş!”; *Cumhuriyet*, 20 February 1928; “Yalnız Türkçe konuşmalı”, *Cumhuriyet*, 14 January 1928; “La propagande pour la langue turque”, *La République*, 31 January 1928.

26 Sign language is not included in these policies.

27 BILLION / MUSLU (2007).

through the Treaty of Sèvres of 1920, which dislocated the Ottoman territory after the First World War.²⁸ The Turkish language continues to be a major identity parameter and a geopolitical strategy in the 21st century, as shows the *soft power* foreign policy discourse, developed by former Foreign affairs minister Davutoglu and inspired by the ‘Turkophonie’ of the Gülenist movement.²⁹

The violent assimilation process that the official monolingualism implied reached a very important peak in the 1990s, at the most intense point of the war with the Kurdish Workers Party (PKK). These policies also led to the arrest in 1991 of the first female Kurdish Grand National Assembly member Leyla Zana, after she lost her parliamentary immunity. She was condemned to ten years in prison for treason, because she made her parliamentary oath in Kurdish, pleading for the fraternity between Turkish and Kurdish peoples. Kurdish was then still spoken in private but forbidden in both official and public spheres. Despite her arrest, her activism shows that individual militants played an important role to push back boundaries and extend the horizons of strictly homogenizing policies like in Colombia.

2 Claims on linguistic diversity: old and new power relations

While Colombia offers a rather linear evolution regarding how the noose is more or less tightening around linguistic diversity, Turkey engaged in a rollercoaster equality management. Despite the violent authoritarian measures, Turkey also had to yield ground to its opponents. In the bigger picture, the periodization of those evolutions is comparable to the one of Colombian key inflections. Also notably similar are the actors making these changes happen. Crystallized around the unicity of state language, the excluding uniformization pronounced by the state has flown outside the state scheme. These alternative voices advocate for equality in its *aequitas* understanding, namely legal equality that takes into consideration all *de facto* diversities and inequalities.³⁰ It has, however, been a hard and long-fought battle, and after decades of colonial domination and blindly covering uniformization, the old power reflexes can easily be reproduced.

28 BILLION / MUSLU (2007); SCHMID (2014).

29 BENHAÏM / ÖKTEM (2015).

30 COMTE-SPONVILLE (2013).

2.1 An equity claims' tool transcending the state apparatus

2.1.1 *The first wave of social liberalism in the 1960/70s: power to the people*

As noted, although diversity is an ever-existing social reality, its acceptance as a social necessity and political right is very recent, and probably a counter-effect of the suffocating homogenization established in the 20th century. Diversity is now understood as *aequitas*, i.e. in the spirit of justice and should as such, legally acknowledge differences and idiosyncrasies. It is thus little wonder that the first significant claims and victories for legal recognition of diversity have been achieved at a time, when the world had been shaken by a strong commitment to the right of self-determination, which was illustrated by the wide decolonization movement. Born at the end of the 19th century, this fundamental principle of international law was swept aside by the League of Nations, which counted among its first missions the legitimization of the territorial boundaries of the nation-states, recently created out of the territories of the former Ottoman Empire.³¹ Reintegrated by the UN in 1945, the principle was reinforced with new resolutions in 1960, which firstly targeted the colonies before extending the right to all peoples in 1970.³²

A liberal wave swept the world, most countries experiencing their own 1968-movement or Prague Spring, Moscow increasingly spoke about “*détente*” while more and more political groups, and guerrilleros of Marxist inspiration influenced by Cuba emerged across the world, which instilled fears of popular uprisings or revolutions among state powers. The spirit of these years was captured in the expression “Theology of Liberation”, coined by the Peruvian priest Gustavo Gutiérrez in the Latin-American Episcopal Council held in Medellín in 1968.³³ Widespread in the political praxis of Latin-American theologians, the expression gives a glimpse of a shift of the universality of equality embraced by the Church to equality reconnected to the people and to a principle of solidarity.³⁴ This is precisely in the context of both worldwide liberal inspiration and intimidated states that Lopera

31 See e. g. SHIELDS (2011).

32 UN General Assembly Resolution 2625 (XXV), adopted on 24th October 1970.

33 GUTIÉRREZ (1973).

34 JULIEN (1984).

observes “paradigm shift from assimilation to the ethno-development”, especially with the creation of the Regional Indigenous Council of Cauca (CRIC), advocating for the defence of indigenous history and culture, including the language.

Similar dynamics could be observed in Turkey in the 1970s with unprecedented social mobilizations. Unions and associations, but smaller militant groups as well were also formed. While Alevis for example, have attached their claims to a global cause carried by Marxist movements, which were supposed to work for the liberation of peoples of the world, a segment of Kurdish activists created their own movement for the independence of Kurdish people in 1978, also of Marxist influence, the PKK.³⁵ However, the Kurdish claims supported by pro-Kurdish political parties or many other non-governmental organizations kept pushing an agenda firstly set on the cultural level – starting from the use of their language, which contradicted the Turkish constitution as well as its interpretation. If the effervescence of social-political claims did not lead the Turkish Republic to give way on diversity or linguistic policies – but led to a coup in 1980 –, the different minorities kept challenging the state. Besides, perceived positively or not by the population, they could not be simply hidden behind a homogenized discourse anymore.³⁶

On the way toward legal linguistic diversity, significant steps have been made with the efforts of the civil society, or the claims and actions of non-state actors. This is a common and interesting feature between Colombia and Turkey. In parallel, the supra-state bodies have offered both legal tools and interface to support or to give visibility and voice to those whom Mumia Abu-Jamal would call the voiceless. Lopera mentions, for instance, that, even though weakly enforced in Colombia, the International Labour Organization’s (ILO) Convention of 1957 (n° 107) acted in favour of a governmental communication in the language of indigenous and tribal populations about their rights when necessary. On the other side of the Atlantic, one of the most important structures for any person, group of individuals or non-governmental organization to contest a violation of their rights, including linguistic, under the European Convention on Human Rights is the famous

35 The PKK has been designated a terrorist organization by Turkey and, since 2002, the EU.

36 MINORITY RIGHTS GROUP INTERNATIONAL REPORT (2007).

Court of Strasbourg, the European Court of Human Rights (ECHR). Turkey has been condemned several times, for instance on the basis of not providing proper legal assistance to non-native Turkish speakers,³⁷ or for prosecuting a politician who had permitted participants at a congress of his political party to speak in Kurdish.³⁸ The impact on Turkish policies of the Court's decision is relative, but it remains symbolically important for its foreign policies and vital for Turkish civil society.

2.1.2 The second wave of liberalism: the acknowledgment of idiosyncrasies

These movements across the world have been lessened by different state strategies to preserve a status quo of power. While some governments responded with crackdowns, as in many places across Latin America and Turkey in the 1970s, others opted for more flexible measures. In the 1980s, a shift in the political terminology occurred, preferring 'integration' over 'assimilation' to name the rather similar processes of homogenization, yet the first might supposedly be chosen and is usually considered as not being about losing identity.³⁹ 'Integration' would thus tend to acknowledge diverse cultural expressions – not to say folklore. It thus appears that, at the turn of the 20th century, the left-liberal wave from the mid-1960s ended up transforming into a rather right-liberal one. Based on humanism or acknowledging the epoch's evolutions, the latter glosses over political dimensions of diversity and admits a social diversity, which can no longer decently be denied. This 'normalization' of the diverse components of society did not yet give up on power, namely in our case, on the unicity of language in the legal spheres.

The rule of the Islamic-conservative AKP government, which has been in power since 2002, provided the occasion of a surprising watershed, comparable with the Colombian shift toward multiculturalism at the beginning of the 1990s, which was partially enabled by the general lassitude of the armed conflict with the FARC-EP guerrilla group. The first decade of its rule has

37 Case of Sultan Şaman v. Turkey, ECHR, 5 April 2011. The Turkish court deprived an illiterate Kurdish woman with a limited knowledge of the Turkish language, who was imprisoned for membership of an illegal organization, the PKK/KONGRA-GEL, of the assistance of a lawyer and an interpreter.

38 Case Semir Güzel v. Turkey, ECHR, 13 September 2016.

39 GASPARD (1992); BERRY (1997).

been marked by important liberal reforms in line with EU standards. Most importantly, the war with the PKK had stopped with the arrest of its leader, Abdullah Öcalan in 1999. The liberal trend in both countries, together with the pressure of the international community for the acknowledgment of diversity, seems thus more like a contingency to soothe the mind, than a real concession on what was intended by ‘diversity’. The lassitude of decades of war and heavy human losses led to a general demand by both Turkish and Kurdish populations for peaceful cohabitation, as clearly expressed by the civil society. The latter had now become a new factor that the AKP took into consideration in its electoral calculations without fearing the Turkish nationalist ballot’s sanction.

2.2 Linguistic diversity embedded in arcane powers

If both Colombia and Turkey seem to have taken significant measures for more visibility and room for linguistic diversity in the legal arena, this diversity seems first to be stuck at a cultural level without reaching the decisional spheres or the normative production, as well as to be burdened with old features that slow them down. The implementation also appears to be unexpectedly challenging on the ground.

2.2.1 *Implementation of linguistic diversity: new strides and old ruling actors*

Lopera’s analysis is also very interesting in terms of showing how the liberal developments concerning the recognition and rights of linguistic diversity – and thus the indigenous populations – can be instrumentalized by political classes or operating forces, especially in the post-conflict context. In Turkey, the integration processes have always followed a strategy of violent incorporation that provoked intense counter-reactions and insurrections, of which the most significant ones took place in 1938, 1960, 1978, and 2013. In Turkey as well, the legal framework on linguistic diversity has been linked to foreign policies, as the current party in power, the AKP, has had the ambition to reassert itself as a major regional actor and leader of the Muslim world.⁴⁰ But the linguistic diversity as well as democratic steps forward also

40 See e. g. ERSEN / KÖSTEM (eds.) (2019).

largely depended on calculations with regard to the local or national elections.

As mentioned earlier, the AKP targeted the important Islamic-conservative voting potential in the predominantly Kurdish provinces, where the choice of integration was more attractive than the ongoing violence. The AKP has opened an era of dialogue with the Kurds of Turkey with the negotiation of the terms of a possible peace from 2013 on. The Kurdish language has been authorized to be freely spoken in public spheres, and Kurdish-language TV channels have also been endorsed. Since 2012, Kurdish can be taught as an optional language in the Turkish education system within the initiative of the “learning of living languages and dialects” in line with a previous Regulation in 2002, on education in diverse languages and dialects, which was the first step towards the recognition of the more than forty minority languages in Turkey. Most significantly, even though the courts apply it parsimoniously, the right to issue one’s plea in “a language other [than Turkish] in which one declares one can express oneself better” has also been granted by the law of 24 January 2013,⁴¹ within a larger electoral calculation. However this seemingly progressive step turned against linguistic diversity as soon as these regions overwhelmingly showed interest in a promising pro-minority party, the HDP (People’s Democratic Party).

Indeed, since the Gezi protest movement in 2013 and especially since the important rise of the HDP and the coup attempt in July 2016, the government has returned to the tradition of unbending discrimination toward diverse voices – not only linguistic – by broadening the definition of terrorist to include any kind of opposition or critical forces. Prisons and courts were overwhelmed with this kind of trials, which have been the jurispathic theatre

41 “*kendisini daha iyi ifade edebileceğini beyan ettiği başka bir dilde yapabilir*” Article 202, paragraph 4b of the Turkish Criminal Procedure Code. It is worth underlining that the legislator took care to avoid making express references to “Kurdish” or to “mother tongue”. With that said, it is important to stress that this law actually formalized an ongoing practice, as some courts in the Kurdish provinces did allow – though in a limited fashion – the defendant to express himself in Kurdish, e.g. in the case of Mehdi Tanrıku in September 2007, who was allowed to plead with the help of a translator after claiming not to know Turkish well. This could, however, also be observed in the case of defendants who could speak Turkish very well, such as in the cases of politicians, such as Hadip Dicle before the Criminal Court of Peace in Diyarbakir on 22 October 2010, or Başkani Ruken Yetişkin, before the Criminal Court of Peace in Yüksekova on 27 July 2011.

narrowing down diversity. However, minority languages are still legally spoken in Turkey. The well-known pedestrianized İstiklâl avenue in Istanbul is a lively mix of entertainers singing in Turkish, Kurdish, Hebrew, or English, along with window shoppers speaking in Arabic, Armenian, French and many other languages. No one feels outraged by this multilingualism within the local populations anymore. Even so, just as in the Colombian case, yet more violently, minority languages are excluded from the authoritative arenas of law and decision-making.

2.2.2 *The longevity of the colonial semantics*

This commenting paper should also single out a terminological issue that caused the author, who is unfamiliar with the Latin-American world, some discomfort while reading Lopera's interesting analysis on law and linguistic diversity in Colombia: namely the "indigenous". For a researcher working on the Ottoman Empire, 'indigenous'⁴² does not echo the diversity. It rather targets a heterogeneous group of *others*, namely the natives, who carry the civilizational overtone of the 19th-century colonial context. This European designation is therefore not relevant for the Ottoman and Turkish cases, where the demographic diversity is addressed as a relationship between the dominant Muslim Ottoman-Turkish and the 'minorities'. However, the above-mentioned unease about the use of this terminology does not stem from the different areas of expertise. It results from the heavy political significance colonial semantics continues to cover.

This terminology is very common and often positively – if not romantically – used in Anglo-Saxon and Latin American literature, from scholars to social and human-rights activists to laymen. However, through the author's French and Ottoman-Turkish lenses, the term 'indigenous' carries the colonial stigma, as it belongs to its racial semantics. This contradiction between the racial political connotation of the word and its common use in Latin America is therefore very bewildering. Does this suggest that the very ones who actively and legitimately claim rights for the natives, aboriginal or autochthons under the generic wording of 'indigenous', use a colonial term as a flagship for their claims? If this is the case, one would wonder whether

42 The word is generally found in the archives in French as *indigènes*.

such use is the result of an internalization of colonial vocabulary or whether it is a clearly assumed reappropriation, like some ongoing uses of the racist name “Indio”, e. g. as in the declarations of the Zapatista Army in Mexico.⁴³ But if the aim is a genuine provocation by keeping a piece of history, still this appropriation is so linear that it loses its possible function of creating discomfort. Because even so, “*indio*”, which Lopera identifies as the first invention of the Spanish Empire of a “category that enabled homogenization of the colonized peoples”, is still very pejorative. It is therefore usually avoided in favor of the seemingly more reasonable option of “*indígena*”.⁴⁴ Not considered synonymous with “*indio*” by linguistic authorities,⁴⁵ “*indígena*” is claimed for themselves by American aboriginal peoples, who sometimes add a more specific origin (*indígena maya*, *indígena quechua*, etc.). That said, the Colombian political-evangelical instrumentalization of *indigenismo*, supported by the Bureau of Indigenous Affairs created in 1958, calls into question the continuity of colonial domination forces through such phraseology.

Of course, the author’s point here is not to hide away in a new terminology, which would ultimately have the same pitfalls of domination. But being aware of these terminological nuances, it is worth asking whether, through the longevity of this colonial semantics, the structural hierarchies it essentially involves also continue out of the colonial space-time, and serve as a vehicle for the continuation of white domination of European origin on a wider scale: social-economic, political, normative, epistemic and subjective, i. e. the control over the production and legitimization of knowledge and subjectivity. While supporting claims for equal rights, how does this terminology – and its common admission – contribute to keeping the activists and the natives out of the political and normative arenas, thus perpetuating the colonial dynamics? The legitimate and timely claim for equal rights and dignity through this appellation thus seems quite counterintuitive. Even more so, in times of a major theoretical turn through the decolonial movement that emerged among Latin American academics.⁴⁶

43 Further examples such as *Agencia Internacional de Prensa India*, or also *Parlamento Indio Americano* are quoted in *El País*, 22 January 2006.

44 The article, however, underlines how this debate seems artificial: *El País*, 22 January 2006.

45 *Fundación del Español Urgente* and *Real Academia de la Lengua Española*.

46 One of the pioneering works is e. g. RESTREPO/ROJAS (2010).

Maintaining the common use of the expression '*indígena*' might also be counterproductive, as this generic terminology is often globally used to address the recognition of diversity rights in Latin America. Although the phraseology is intended to tackle the heterogeneous reality, it rather produces a reification of the diversity. The expression seems to reduce the diversity issue to a binary approach, with the group of aboriginals made of "102 indigenous peoples", and the heirs of the Spanish colonists, which is problematic for two reasons. First, it seems to perpetuate in a more acceptable manner the colonial dichotomy between the "Republic of Indians" and the "Republic of Spaniards" that Lopera mentions. Second, it can lead to a counterproductive polarization within contemporary struggles for diversity, as this terminology carries the risk of shifting the legitimacy of the claim for equal rights from the recognition of a historical identity to a mere anteriority of territorial presence. However, Colombia, as with the rest of Latin America, is an integral part of our globalized world in which migratory flows are always active. Accordingly, addressing the diversity issue through the single lens of the 'indigenous' might lead to excluding other components of the society, such as the Afro-Colombians or the citizens of Syrian-Lebanese or Jewish extraction, even though Colombia itself did not attract as many immigrants as Argentina or Mexico.⁴⁷

The Republic of Turkey is not a satisfactory example of an encompassing legal framework for linguistic diversity. The Ottoman Empire seems more compelling to some extent, even though its famous *millet* system consisted of a legal and social hierarchy. By granting a relative autonomy to the communities, the ethnic and religious diversity of the Empire was still recognized and empowered for the sake of pragmatism rather than 'diversity'. The latter would be anachronistic vocabulary and analytical lens, as the diversity issue is a contemporary outgrowth of the Western notion of the modern right of equality. But fundamentally and as Homi Bhabha pointed out, does not talking about 'diversity' actually lead to keep thinking within the framework of a hierarchical system with static and essentialized components? A more heterogeneous approach, which embraces the 'heterochthone' rather than the indigenous, could inspire us with regard to differences in the legal framework because it admits a vitality of diverse world visions, which coexist and influence each other in a non-dialectical way. For scholars from all

47 See e.g. BURGOS CANTOR (2010); KLISH/LESSER (eds.) (1998).

horizons, this vision could allow for a projection onto our contemporary world the notion of heterogeneity as an epistemic engagement of great analytical value, as it shows a way to free us from colonial semantics while keeping our feet firmly grounded in the reality of constant migration flows and evolutions of legal necessities, including diversity and equality.

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Linguistic and Cultural Diversity in the Legal Sphere: Insights from Late Imperial Russia

1 Introduction

This paper is an expanded, comparative commentary on Gloria Patricia Lopera-Mesa's contribution to this volume. In addition to discussing the role of language in Colombia's changing legal order over the last two hundred years, her analysis touches on a range of related subjects: it raises broader questions about citizenship and the integration of minorities, along with linguistic policy and diversity outside the strictly judicial sphere. Her material shows striking similarities with and differences from the case of imperial Russia, which have to do with geography, the role of state law, and the sequence of legal change. I begin by elaborating on these comparisons before discussing linguistic and cultural diversity in the Russian legal sphere in greater detail.

The first striking issue about law and language in Colombia is the country's early independence: as early as 1819, Colombia was both post-colonial and post-imperial, and this specific context gave shape to the evolution of legal policy over the next two centuries. Russia, by contrast, was still imperial until at least 1917, and some would argue that the experience of empire continued until 1991. What is more, even today, with its 85 so-called federal subjects, many of which are ethnically defined and relatively powerless republics (Tatarstan, Chechnya, Kalmykia etc.), the Russian Federation clings to some elements of its imperial legacy.¹ While Russia was never a classic maritime empire with large colonial overseas possessions, it gradually expanded in all directions and thus acquired some colonial traits, such as the growth of Russian settler populations in newly acquired territories. At the same time, and because it was always one contiguous landmass, it used the distinction between colonisers and colonised, along with legal segregation, far more sparingly and as temporary measures only. It adopted universal

1 Two of these are Crimea and Sevastopol, which most countries recognise as being part of Ukraine.

principles relatively early on, as, from the mid-19th century, it increasingly tried to mould its ever-expanding population according to the principles of modern citizenship.² That is also one of the reasons why I tend to use the notion of ‘minorities’ in my analysis of imperial Russia; a notion that many see as associated with the modern nation-state and its homogenising forces rather than with empires, which thrived on difference: with its drive toward universalism, especially in the state legal sphere, the Russian Empire’s myriads of ethnic and religious communities came to adopt traits of 20th-century minorities.

Be that as it may, the Colombian situation, in which indigenous languages are spoken only by a small proportion of the population and with indigenous languages hovering on the verge of extinction, differs from the Russian context: while Russian has dominated public life in the imperial, Soviet, and post-Soviet eras, other languages have always been widely spoken across the territory of the former Russian Empire and Soviet Union. They also enjoyed varying degrees of support from above. In what follows, I concentrate on a comparison of Colombia and *imperial* Russia. An inclusion of all three vastly different political systems for the Russian case, each with its own spatial and temporal distinctions, would not be feasible in this short chapter. Even the imperial period taken on its own was regionally specific and far from static.

2 Comparing imperial and post-imperial contexts: Geography, state law, and changing minority rights in Russia and Colombia

While Russia showed greater linguistic diversity than Colombia – in terms of the local languages spoken and the number of native speakers – it experienced similar geographical challenges (on a magnified scale). As with Latin America, the geography in this case of the Eurasian landmass not only shaped (in fact, usually hindered) contact between newly conquered peoples and the imperial centre’s regional representatives, but also affected the latter’s authority: in some cases, it increased this authority, as local administrators could act as little viceroys with no fear of central interference; in cases in which governors had no resources to impose their wishes, however, geography tended to diminish their clout among the population. While the same

2 LOHR (2012) 43.

logic also applied to governing the Russian peasant population (who constituted over 80 per cent of the empire's population by the early 20th century), the empire's key geographical challenges – vast distances, extreme temperatures, and inaccessible terrain – affected regions inhabited predominantly by non-Russians more greatly than they did other areas. The endless forests and tundras of Siberia and the Arctic north, the steppes and deserts of Central Asia, and the Caucasian mountains were the regions least penetrated by St. Petersburg.

The role of state law in Russia and Colombia also shows differences and similarities. As in the Colombian case, Russian imperial law served as a device for discrimination and assimilation. This, of course, has been widely acknowledged about imperial and colonial law: legal anthropologists and historians have remarked in different contexts that law is the cutting edge of colonialism; that it is made and used to achieve power and control.³ At the same time, state law also became a means of intercultural communication and resistance. Beyond that: in the Russian case, the empire's new generation of liberal jurists, who emerged after the Judicial Reform of 1864 and quickly predominated in the Ministry of Justice and the new court system, came to be responsible for the implementation of the reform in the provinces, and their insistence on modesty, legality, and equality before the law also turned state law into a vehicle for the empowerment of minorities. It was less a case of the state creating institutions which were then appropriated from below, than it was of reform-minded state officials institutionalising new legal principles and courts that helped to undermine persistent forms of discrimination and hierarchy in the otherwise autocratic Russian state.

As far as the sequence of legal change is concerned, the cases of Colombia and Russia reveal remarkable similarities: not least, an initial liberalism towards minorities was replaced in the 1880s by a drive towards homogeneity. In the case of Russia, the liberal spirit was very much tied to the rule of Catherine II (1762–1796), who framed and institutionalised the Russian Empire as a multi-confessional state, an empire taking pride in the pre-eminence of Russian Orthodoxy, on the one hand, and the state-sponsored tolerance of other faiths on the other. The idea of the enlightened, multi-confessional state persisted roughly until the 1860s. It included the establishment of state-sponsored spiritual boards for different faiths, made up of

3 MERRY (1988) 869; MERRY (1991) 890–891; FISCH (1992).

religious dignitaries who would oversee all matters of worship and act as courts of appeal in matters of family and inheritance law within their religious communities (processing cases in the languages of these communities, with Russian-language summaries added to the cases).

Ethnic and confessional policy were inextricably linked because most Russians were Russian Orthodox, most Tatars were Muslim, most Poles and Lithuanians were Catholic, most Baltic Germans were Protestant, and so forth. This coincidence of ethnic and religious identities was challenged over the years by splits within the church, conversions, and imperial expansion. Even so, the coincidence of ethnic and religious identity by and large continued to be a fact of life for large parts of the population and a crucial factor in state policy. Regulations for new territories were often passed with religious groups in mind; and confessional policies often targeted ethnic communities.

The liberal spirit did not, however, capture all. In the Volga region, there were not only Russians and Muslim Tatars, but also groups such as the Chuvash, Mordvins, Cheremis, and Udmurts, some of whom were practising animists. As Russian elites infantilised such people as “children of nature”, who would have to be tamed and civilised by the imperial state, they never even considered the possibility of extending religious toleration, let alone institutional support, to them.⁴ In Crimea, which formed part of the Pale of Settlement, a stretch of land covering a number of provinces from the Baltic to the Black Sea where Jews were allowed to settle, not all minorities were put on an equal footing, either. The Jewish population was formally subject to the same discriminations that existed throughout the empire.⁵ The Karaites, an independent, non-Talmudic religious movement within Judaism, were granted recognition as a religious group in 1837. Like Muslims, Armenians, Greeks, and European ‘colonists’, they were granted autonomy in religious and some administrative and legal matters.⁶

While discriminations thus persisted for some groups, as in Colombia the 19th century was no longer an era of military invasions in which allegedly savage local populations were slaughtered wholesale by Russian forces.⁷ The

4 IUZEFOVICH (1883) 18, 21, 28–29, 35; see also KAPPELER (1982) 482; and GERACI (2001) 75.

5 On the Jewish case: KLIER (1995); NATHANS (2002).

6 WERTH (2014) 140–142.

7 Given the vast distances to the imperial centre and the leeway military commanders enjoyed in the field, there are exceptions to this rule, including the brutal massacre of

diverse peoples of Crimea, the western borderlands, the South Caucasus, Siberia, the steppes, and the Volga and Ural regions had formed part of the empire for quite some time by then. Some of them had undoubtedly been conquered violently in previous centuries, but, by the mid-19th century, most of these former frontiers had been pacified. Policies toward the local populations were shaped by different priorities. While the ‘civilisation’ of the natives was a trope among Russian conservatives, it was just one among many (and rarely dominant). As with the central authorities in Colombia (and elsewhere in Latin America), Russian administrators were increasingly concerned with gathering information and knowledge about the country’s internal ‘others’, sponsoring scientific expeditions into all corners of the empire, along with academic societies, exhibitions and publications.

From roughly the 1880s, the Russian Empire pushed for cultural homogenisation. Emphasis was put on the promotion of Great Russian culture, including Russian Orthodoxy. While toleration remained official policy until the end of imperial rule, nationalism led to more repressive measures against Russia’s ethnic and religious minority groups. The church targeted them in missionary campaigns; educational boards imposed controls and restrictions on non-Russian schools and their staff; and lawmakers continued to deny the non-Orthodox population rights such as the rights to proselytise and have a secular press.⁸ Intellectuals, church officials, and state representatives increasingly viewed minorities through the lens of national and confessional struggle, not least because the empire was faced with competing nationalisms (Polish, Georgian, Finnish etc.), and wars up against the Ottoman Empire and Islamic groups in the North Caucasus. Russian statesmen and thinkers had predicted a gradual fusion of the empire’s nationalities into a single people since the early 19th century; but it was only from the last quarter of that century that they actively promoted the *sbliizhenie* (rapprochement) and *sliianie* (fusion) of the empire’s minorities with the Russian population.⁹ Under Alexander III (1881–1894), discrimination against minor-

Turkmens as part of General Skobelev’s move into Central Asia. Such behaviour was, however, not part of official policy.

8 ZAGIDULLIN (2000); GERACI (2001); and WERTH (2002)

9 BECKER (1986) 34; TOLZ (2011) 36–43. For an example of the use of such terminology in contemporary discussions, see IUZEFOVICH (1883) 40.

ities became virtually intrinsic to state policy.¹⁰ Whatever policy confusion had existed before was replaced with sustained support for the Orthodox Church, especially in the Baltic and Western provinces.

That said, unlike in Colombia, the homogenisation drive did not create a second-class citizen status for Russia's native populations. The empire never developed a systematic policy toward its internal 'others', and so a group's degree of integration (or segregation) depended on what the authorities thought of them wherever it was they lived. Beginning in 1822, most non-Christian inhabitants of Siberia, and later Central Asia and the Caucasus, were put into the legal category of *inorodtsy* (aliens, or literally "those of other descent"). As a separate group listed in the Digest of Laws, which began to be published at regular intervals from 1832, the *inorodtsy* stood outside the empire's social structure; they were second-class subjects, constructed as inferior to all social strata of imperial society.¹¹ The nomadic and semi-nomadic peoples of Asia formed part of this group, as did the mountain dwellers of the North Caucasus, the indigenous city populations of Turkestan, and (for a long time) the Jews. By contrast, the Muslims of Crimea and the Volga-Kama region, along with Armenians, Greeks, Chuvash and most other ethnic and religious minorities in European Russia, were considered to be culturally more advanced and thus integrated into the estate structure of peasants, merchants, town-dwellers etc. In the legal sphere, they were rarely referred to by religious or ethnic categories. Records of circuit court trials did not specify whether defendants, litigants, or witnesses were Tatars or Muslims. Participants were referred to exclusively by name, estate, and geographical origin (for example, "the peasant Abibullah Gaifullin, from the village of X, district of Y, province of Z"). That said, many rules in the Russian Empire were passed and enforced only in certain regions, and this localisation of rule led to a growing fragmentation within religious communities. While Muslims in the Volga region and Crimea were increasingly integrated, Muslims in the Urals and Siberia, along with those in Central Asia and parts of the Caucasus, continued to be segregated as *inorodtsy*. The homogenisation drive of the 1880s did little to change this situation. Most subjects were ruled by the empire's universal laws, while some groups were excluded from them.

10 LÖWE (2000) 77–78.

11 MARTIN, V. (2001) 37–43; SŁOCUM (1998) 181.

Either way, this repressive period lasted for only about 25 years; it changed with the 1905 Revolution, which formally did away with the Catherinian ideal of the tolerant, enlightened state: the first Russian constitution, which the revolution brought about, not only curbed the powers of the previously autocratic tsar by introducing a parliament (Duma), but, for the first time, framed people's rights (Russian or non-Russian) in terms of civil rights rather than privileges granted by a tolerant sovereign. This first constitution also introduced freedom of speech, conscience, and faith. In this sense, the Russian social historian Boris Mironov is right to refer to the last twelve years of Russian imperial rule as a fledgling 'rule of law' state, as opposed to the 'lawful' state of the previous decades.¹² While the post-1864 judiciary protected people's rights as vigilantly as it could, it had the problem that the existing rights were limited.

Most of the novelties introduced in Colombia in the 1970s and following the new constitution of 1991 were only introduced in Russia under Soviet rule, especially the systematic promotion and privileging of indigenous languages within their own ethnically defined territories (such as the Uzbek Soviet Socialist Republic, or the Bashkir Autonomous Soviet Socialist Republic). From the early 1960s in particular, the 'flourishing' (*rastsvet*) of nations became a pillar of Soviet policy, with each recognised and favoured nation having their own indigenous elites, national culture, and language consistently promoted by the state.¹³ To capture this promotion of diversity while stressing the central role that Moscow and the Russian language continued to play, Terry Martin coined the notion of the "affirmative action empire" for the Soviet Union.¹⁴ As we shall see in what follows, such promotion of local languages was unthinkable under imperial rule.

12 MIRONOV/EKLOF (2000) 238–240.

13 Favoured nations were usually those that had their own ethnically defined republics within the Soviet Union. Others, such as the Crimean Tatars and Germans, were punished and persecuted for different reasons. A third group that includes the Chechens enjoyed a degree of territorial autonomy but fell out of favour. On how Soviet nationality policy worked in individual union republics, see ROLF (2014) 203–230.

14 MARTIN, T. D. (2001); see also SLEZKINE (1994) 414–452.

3 Linguistic policy in the Russian empire: between unification and diversity

No linguistic policy worth mentioning emerged in Russia prior to the proclamation of empire in 1721. It was Russia's 18th-century advance into areas where German, Polish, Baltic languages, Yiddish, Ukrainian etc. predominated that turned language into a policy matter. While early modern Russia had already been a multilingual entity, its multilingualism had included Turkic languages such as Tatar and Chuvash, Mongolian languages such as Kalmyk, and Finnic languages such as Mordvin, languages and cultural contexts, in other words, that Russian rulers and their entourage considered to be inferior. The policy of ignoring local linguistic diversity, however, could not be applied to the western borderlands, as this region was economically, socially, and culturally more advanced than Russia proper. Concessions had to be made, particularly to the German and Polish-speaking elites. What followed was an emphasis on linguistic autonomy, albeit a selective one, for non-Russians during much of the eighteenth and early 19th centuries. This policy only changed after 1830, and especially from the mid-1860s, when the Russian language came to be promoted with full force.

That said, overall, the empire's linguistic policy remained unsystematic, localised, and changeable.¹⁵ In the Baltic Sea provinces (*Ostzeyskie gubernii*)¹⁶ and Finland, the Western Provinces (which included much of today's Lithuania, Belarus, and Western Ukraine), Bessarabia (after 1812), and Poland (after 1815), education and administration functioned largely in the languages of local elites, namely German, Polish, Swedish, or Romanian. Baltic languages, Finnish, along with Ukrainian and Belarusian, played less of a role, both because they were deemed culturally inferior (even mere dialects of Russian, in the latter two cases) and because speakers of these languages were less visible in urban centres. The Jewish population spoke Yiddish in everyday life, but was required to offer schooling in Russian, Polish, or German, and also to keep all economic records in one of these languages. After the annexation of Crimea in 1783, the Russian authorities relied heavily on Tatar nobles for administrative matters, and on Karaite, Turkish, Tatar,

15 For details, see PAVLENKO (2011) 331–350.

16 The Baltic Sea provinces were Estonia, Livonia (Livland) and Courland. The latter two cover large parts of modern-day Latvia.

and Greek merchants for maintaining trade networks. While Russian formally became the language of the Crimean administration, most decrees, tax regulations and other official documents were almost immediately translated into Tatar so that the local economy and administration could continue to operate.¹⁷ In short, linguistic diversity was tolerated, even encouraged, during this period; but it was also highly selective in that it supported some languages more than others.

From around 1830, local autonomy came to be viewed more sceptically by St. Petersburg. Romanian largely disappeared from the administration and education sectors in Bessarabia. More strikingly, following the 1830–1831 Polish Uprising, Polish was replaced with Russian as the language of education and administration in the Western Provinces, and the Polish-speaking universities of Warsaw and Vil'na were closed. Still, on the whole, the centre had neither the resources nor the intention at this point to turn its borderland populations into Russians; and so these measures continued to be localised and, in some cases, weakly enforced.

The Great Reforms of the 1860s represented a paradigm shift insofar as the multi-confessional state, with its stress on tolerance and diversity granted by enlightened monarchs, came to be replaced with the notion of secular citizen-building. The latter called for more interventionist and inclusive rule: the empire's subjects were no longer to be left to their own devices, but rather to be integrated and treated in ever more similar ways. The standardisation of administrative procedure and the concomitant spread of the Russian language through schools, offices, and court rooms was one of the measures through which such citizen-building was to be achieved. That said, post-reform lawmakers in St. Petersburg were just as concerned about stability and every bit as wary of separatism as had been their predecessors. The 1863–1864 Polish rebellion, along with growing nationalism along the empire's edges, was therefore just as much at the root of this shift in language management. In Poland itself, the Polish language was virtually eliminated from public life. The Ukrainian and Belarusian languages were faced with a series of bans that limited them to informal use. Even the Baltic Germans, who had perhaps most consistently enjoyed linguistic and other privileges, saw their education, administration and judicial sectors being transformed from (partly or predominantly) German-speaking to Russian-

17 O'NEILL (2017) 68–71, 228–235.

speaking institutions between 1882 and 1895. Russian-speaking schools mushroomed across the empire, increasing from 23,000 in 1880 to 108,280 in 1914.¹⁸

Overall, however, legislation could not eradicate linguistic diversity. First, efforts at homogenisation were ultimately short-lived. By 1905, the clamp-down on diversity was basically over. Concessions were made to various national movements, and a variety of languages were admitted or readmitted into the press and education sectors. Second, and more importantly, the effects of the restrictive measures were modest. In Poland, people continued to speak Polish, albeit informally and with greater attention to who was listening. Across Central Asia and parts of the Caucasus, the impact of Russian-language schooling was negligible, as Islamic schools proved far more popular; usually only those who worked directly with the state authorities could speak Russian. In Finland, even educated Finns felt little pressure or motivation to learn Russian, as the local state administration functioned almost entirely in Swedish and Finnish.¹⁹ Perhaps the most lasting effect of Russia's changing linguistic policies over the centuries was that, while few non-Russian elites adopted Russian as a first language, most took it on as an additional one.²⁰ That said, the masses were a different matter. Either way, by the census of 1897, non-Russians constituted 57 percent of the empire's total population.²¹ There is little doubt that a large share of imperial subjects spoke very little or no Russian at all. What effects did this have on the developing legal system?

4 Legal pluralism and the language of law

The tsarist context provides a contrast to the form of legal pluralism described for Colombia. While both cases showed a *de iure* monolingualism paired with a *de facto* multilingualism, the reasons and implications were different. In Colombia, informal multilingualism was the result of the coexistence of state law and indigenous normative systems. While the Russian Empire also accommodated multiple normative orders communicated in

18 HOSKING (1997) 326.

19 THADEN (1984) 207–209, 226–227.

20 PAVLENKO (2011) 345.

21 KAPPELER (1992) 10.

minority languages, it did more than that: in practice, it tolerated linguistic diversity in state courts. What is more, the notion of state law meant a mosaic of legal repertoires that were not necessarily based on laws passed by the imperial centre. The reach and meaning of state law were dynamic and differed from region to region. Various judicial instances in the state legal system, including justices of the peace and so-called township courts at the rural level, were allowed to draw on local customs in their rulings; and Russia's Civil Code permitted cases of family and inheritance law to be judged in accordance with the religious rules to which the litigants were subject (for no subject of the Russian Empire was allowed not to profess a religion).²² In order to make sure that these rules were observed, in most of European Russia the empire co-opted religious dignitaries of different faiths (speaking different languages) into the state legal system, requiring them only to draw up concise Russian-language summaries of their verdicts. For anything other than family and inheritance law, from the 1860s, Russian lawmakers mandated the universal laws of the empire (communicated in Russian) for the bulk of the population west of the Urals, irrespective of the faith, ethnicity, or linguistic background of those drawn into legal disputes.²³

In the North Caucasus, the steppe region, and Turkestan, the authorities sought to identify the native populations' 'customary laws', which they then tried to codify and control, with varying degrees of success. In most cases, this led to the promotion of all-purpose indigenous courts (where cases were handled in the language of the region), which existed alongside imperial courts responsible for cases involving Russians. The indigenous courts were encouraged to deal with criminal and property cases in accordance with *adat*, and they were allowed to invoke the *shari'a* in cases of family law.²⁴ The central state thus consciously appropriated the local courts in the borderlands, establishing a state-centred legal system that deliberately included different procedural and normative orders.²⁵

22 BURBANK (2006) 397–431.

23 KIRMSE (2019) 66–73.

24 On the North Caucasus, see: BOBROVNIKOV (1999); BABICH (2005) 255–270. On the steppe region: MARTIN, V. (2001) 52–59, 87–113; BRUSINA (2005) 227–253. On Inner Asia: WILLIAMS (1966) 6–19.

25 BURBANK (2006) 402–403.

The Judicial Reform of 1864 did not do away with the legal pluralism described above, but introduced new institutions, revolutionised court procedure, and, in some respects, furthered legal unification.²⁶ Russia's reformers introduced public trials, oral procedure, and an independent judiciary, thus importing European legal principles and judicial models into the empire. The reform was designed to install a simple and efficient legal system, or, in the words of the emperor, "a quick, just, merciful, and equal court for all Our subjects (*sud skoryi, pravyi, milostivyi i ravnyi dlia vsekh poddannnykh Nashikh*)".²⁷ To this end, it created a range of new institutions.²⁸ Justices of the peace (*mirovye sud'i*) were introduced at the district level to deal with minor disputes and offences. Serious crimes and major civil disputes came to be heard by circuit courts (*okruzhnye sudy*), which usually covered whole provinces.²⁹ Unlike the old estate courts of the pre-reform period, the new courts were, by and large, open to all. With few exceptions, all imperial subjects were made equal before the law.

Even so, there were geographical constraints. Initially, the plan to spread legality across the empire seemed realistic only in the traditional heartlands of European Russia and in adjacent intermediate terrains, such as Crimea, the Volga region, and the steppes of southern Russia. More peripheral regions were added later, mainly because of the vast distances, lack of infrastructure, and resulting logistical problems for law enforcement: the Arctic north, Siberia, and inner Asia adopted the new courts only between 1896 and 1899.³⁰

The expansion of the new order also followed a cultural logic, which led to variations in court procedure. Lawmakers chose not to use a jury system in most parts of Tiflis Judicial District, Poland, and (initially) the Baltic provinces; nor were juries adopted in the steppe region and Turkestan: knowledge of Russian was too patchy in these regions for popular jury service to be an option. Cultural considerations also affected the order in which territories were included in the new system. The differences in the local populations' purported stages of development led the authorities to

26 For details: KIRMSE (2019) 4–14, 59–66.

27 Ob uchrezhdenii sudebnykh ustanovlenii (1864).

28 KUCHEROV (1953) 43–50; BABEROWSKI (1996) 62–65.

29 See Ustav grazhdanskago sudoproizvodstva (1864), passed on 20 November 1864.

30 The reform's geographical expansion is discussed in detail in BABEROWSKI (1996) 339–427.

believe that inclusive, universal courts could only be introduced in places where a moderate level of ‘development’ already existed. Still, the early expansion of the new order into culturally diverse regions such as the Middle Volga and Crimea – intermediate terrains, as we might call them – was striking insofar as it brought large numbers of non-Russians under the jurisdiction of the new courts, Tatars, Mordvins, Greeks, Karaites, and Armenians, to name some.

In which language did these people communicate in court? Formally, Russian was the only language allowed in the circuit courts; all officials had to speak it, and only people who understood Russian could be called up for jury service. As the jurist Vladimir Spasovich put it, that some people in the courtroom did not understand Russian was not taken into account when drawing up the reform, or it was imagined as a rare exception.³¹ Still, there was some awareness of the new courts’ diversity. When opening the Simferopol Circuit Court in April 1868, a senator from St. Petersburg addressed the cultural specificity of the local population directly:

“Continuing its gradual expansion, today the judicial reform is also implemented on the Crimean peninsula. This remote part of Russia [...] now receives a court rooted in principles that guarantee the personal safety, property, and liberty of each and every one. Among all localities in the region of New Russia, Crimea stands out for the great tribal diversity of its population. Here the new court will come face to face with different nationalities, and with the most diverse languages, faiths, morals, and customs.”³²

He did not frame these challenges in terms of a problem, calling on all to join him in prayer:

“Let us all – Russians, Greeks, Bulgarians, Armenians, Germans, Karaites, Jews, and Tatars, subjects of the one Sovereign without difference in tribe or faith – now turn to the one Lord, with warm prayers, that He may bless the beginning of a great cause and help us carry it out successfully.”³³

The linguistic diversity of this great cause, however, required practical solutions. For cases in which the litigants or accused did not understand Russian, the law prescribed the use of interpreters. Some circuit courts, such as Kishinev (Bessarabia) and most courts in the South Caucasus, employed full-

31 SPASOVICH (1881) 29.

32 *Odesskii vestnik* (1869).

33 *Odesskii vestnik* (1869).

time interpreters; others, including Simferopol (Crimea), consistently but unsuccessfully lobbied for permanent interpreters in St. Petersburg.³⁴ Intermediaries, however, were no solution for regions such as Bessarabia, the Baltic Sea provinces and especially Poland, where not only the litigants and witnesses but also the judges and lawyers tended to be native speakers of Polish, German, and Romanian (not least because few Russian jurists wanted to serve there). In practice, therefore, local languages were constantly used in state courts because the system would not have worked otherwise. It was a glitch the reformers had not foreseen. Only in the Baltic provinces was this practice ever formally recognised. In May 1880, when the first step toward the reformed judiciary, the justices of the peace, was introduced, German, Estonian, and Latvian were admitted for both written and spoken court procedures.³⁵ As before, though, there was a hierarchy of languages: in appeals forwarded to the Senate in St. Petersburg, the key summaries had to be provided in Russian; accompanying materials (instructions and verdicts by justices of the peace, or interrogation records etc.) were admissible in German, but not Estonian or Latvian, and had to be supplied with a Russian translation.³⁶

Finally, linguistic diversity manifested itself in oath-taking ceremonies. Oaths were required from people sworn into judicial positions, in addition to being a standard procedural element in civil and criminal cases. This is where religious dignitaries, such as priests, mullahs, rabbis, and Karaite *bazzans*, entered the picture. Following the rules of court procedure, people took their oaths “in accordance with the dogmas and rituals of their faiths” (*soglasno s dogmami i obriadami ikh very*); and clergymen were needed to preside over this part of the proceedings. The circuit court therefore maintained constant contact with local religious bodies. Crimean court staff routinely wrote to the Muhammadan Spiritual Administration of Crimea, the Karaite Spiritual Administration of Tauride and Odessa, and the Eparchy

34 SPASOVICH (1881) 31–33; and State Archive of the Autonomous Republic of Crimea (GAARK), fond 376 (circuit court), op. 1, d. 21 (1871) l. 15.

35 O vvedenii mirovykh sudebnykh ustanovlenii (1880), esp. section A 14, passed on 28 May 1880. When the full reform was finally introduced by decree on 9 July 1889, the multilingualism was retained for the justices of the peace. These local judicial institutions could also forward certain complaints and requests to the new circuit courts in “local languages” whereas the circuit courts themselves operated exclusively in Russian.

36 O vvedenii mirovykh sudebnykh ustanovlenii (1880), esp. section A 14.

of Tauride and Simferopol to inform them of imminent court sessions. These institutions would then supply local clergy with translated versions of different oaths. This practice continued until 1875, when the Ministry of Justice decided to have officially approved translations prepared at the centre and sent out into the provinces.³⁷ The Kazan Judicial Chamber in the Middle Volga region, for example, received translations in Tatar, Chuvash, Votiak, highland and lowland Cheremis; and, to make sure that non-Russian speakers understood these oaths, they were allowed to take them in their own languages.³⁸

5 Conclusion

Tsarist Russia was an imperialist power, with ever-growing territories along its western and southern borders that scholars now increasingly view as colonial possessions. For centuries, the empire and its elites took pride in their diversity even if it was always clear that Russians held a dominant position. Some measures were taken to homogenise administrative and, to a degree, also cultural practice, especially from the 1860s onward, and yet, the Russian Empire could not, and never wanted to be, a Russian nation-state. Perhaps this is the key difference with 19th-century Colombia, which was post-imperial (though left with the language of the former imperial overlords) and keen to achieve greater national cohesion. Empires, by contrast, thrive on difference, and Russia was no exception. Linguistic diversity thus persisted while it continued to be hierarchical, selective, and unsystematic. Rules that applied in Estonia did not apply in Lithuania, let alone Turkestan; and rules that existed on paper were often bent in practice. Local elites knew this as much as lawmakers in St. Petersburg. In fact, this tacit bargain may have played no small part in contributing to the empire's durability.

37 National Archive of the Republic of Tatarstan (NART), fond 41 (circuit court), op. 1, d. 24 (1871) l. 56.

38 NART, f. 41, op. 1, d. 24, l. 56.

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Conclusion

Categories and Concepts, Themes, References, and Outlooks in the Conference Discussions on “Law and Diversity”. A Structured Summary*

The depth and the variety of the topics and questions addressed in the contributions were mirrored in the multifaceted richness of the correspondingly lively discussions that followed all the presentations. Due to this breadth, however, only selected aspects from these can be touched upon here. The following summary thus attempts to identify and focus particularly on certain recurring basic themes, or particularly striking problems and observations. It, therefore, cannot make any claims of completeness but, instead, tries to bundle and sort individual and scattered statements to bring to the fore overarching themes, or memorable accentuations voiced in the conference discussions. The aim is, therefore, to present and suggest some possible structuring and certain approaches of categorisation, all the while being fully aware that there can be other equally legitimate forms in which the extensive discussions could be summarised. For this purpose – elaborating contours, exposing or highlighting overarching aspects, and sketching out some structuring according to them – this summary will largely refrain from quoting concrete statements or mentioning names. Furthermore, references are only made in selected cases, particularly when it seemed apt to point to some examples of explanatory, further or in-depth literature.

1 Functions of diversity in law, shared experiences, and ‘*Sonderwege*’

In view of the title of the conference series, addressing ‘Law and Diversity’ in studies and comparisons from both a European *and* a Latin American per-

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spective, it came as no surprise that the overall question of national, country-, or legal-culture-specific traditions and specialties immediately emerged as a dominant field of discussion. Therefore, these aspects did not only take up a large part of the contributions, but also of the discussion.

For both regions of the world, the discussion gave the impression that the emergence of the individual (nation) states seemed to have been a crystallization point and a catalyst for significant debates on ‘Law and Diversity’, whereby, in all the examples presented in this regard, problems of social, cultural and, in each case peculiarly associated with this, legal diversity arose in different ways. Therefore, the reflections focussed on the possibilities of explaining such differences.

A first dividing line between the European and Latin American examples was apparent in the fundamentally different basic experiences that were each shared, and that shaped the respective discussions as a sort of common ground and frame of reference. On the one hand, in the case of Latin American countries, this common background and reference point was the central, but, at the same time, heterogeneously experienced role of Europe. On the other hand, among the European examples, the tradition of Roman law¹ and the increasingly widespread idea of a democratic state could be identified as a common ground.

As soon as the participants took a closer look at the lower and more concrete level of the individual national case studies, however, it became clear that, in view of the historical-empirical findings, further attempts at a comprehensive and, at least for the continents, generalised presentation would bring considerable difficulties. Coming, for example, from the seemingly paradoxical observation that Brazilian authors speak for their country of a ‘*Sonderweg*’ while, at the same time, referring to ideas of order and evolution that are depicted as universal ones, the question was raised as to

1 For perceptions on the role of Roman law as common background see prominently KOSCHAKER (1966). From nowadays, and against the backdrop of increasing Europeanisation of current (private) law: ZIMMERMANN (1992); in the same line ZIMMERMANN (2002) 248 f., emphatically claiming the “unabated actuality” of Koschaker’s message and explaining the differentiated understanding (255); cf. also 311: importance of Roman Law for “the Latin West and Middle Europe” in being the “basis of an essentially uniform legal culture” (“Grundlage einer im wesentlichen einheitlichen Rechtskultur”). See further, especially, the references there 252, no. 45, among them, *inter alia*, BELLOMO (1995); for English and Spanish literature see only ZIMMERMANN (2001/2010).

what extent the national traditions and developments might be more appropriately understood as a bundle of individual ‘*Sonderwege*’.² However, insofar as the discussion revolved around this figure of ‘*Sonderweg*’, the usefulness of this category did not remain undoubted. Attendees were urged to consider that developments perceived by some as ‘*Sonderweg*’ occurred everywhere and at all times, and, in this respect, they represented more the normal situation than a remarkable, special deviation as such. Based on the heterogeneous empirical findings of the individual contributions, it was therefore concluded that the impression of a ‘*Sonderweg*’ character with regard to individual countries constitutes, in turn, an overarching commonality of historical experiences with ‘Law and Diversity’: all national traditions represented a special path, of course, at least in the sense that they were specific answers to specific problems.

For this question of special national, cultural or state-specific traditions, it particularly turned out that from the (legal) historical approach to the phenomenon of ‘diversity’, the respective understanding of the *function* attributed to diversity in the context of law is of high importance. The validity of such function-oriented approach to possible specialities was especially evi-

- 2 On pluralities of “*Sonderwege* instead of *the Sonderweg*”, especially (“[i]n the global trajectory of Marxist historical thought”) LIM (2014) 280. For general examples of discussions centred around this concept in transnational or global perspective, just see the reports on the 2010 Seoul conference on ‘Postcolonial Reading of *Sonderweg*: Deconstructing Exceptionalism as National Narrative’: LEE/HA (2010) (188 f.: “For the most part, participants agreed with the assumption that every nation has its own *Sonderweg*, although the term was used with slightly different meanings. [...] However, this conference’s primary aim was to deconstruct the normative conceptions of the imagined ‘West’ in the logic of the *Sonderweg* paradigm, which have imposed the hegemony of Western modernization on the historiographies of European and Asian nations.” On “widespread European *Sonderweg* narratives” [in the plural], cf. 189 referring to a contribution by Stefan Berger); DITTRICH (2011) on “the proliferation of *Sonderwege* in Europe”. For the history of the use of the term in the more conventional, Germany-focussed context and the respective controversies see only WEHRHEIM et al. (2020) where “*Sonderweg*” is selected as one of the most important historiographical “(Leit-)Begriffe” and some data on its use over time is presented, but also with further references for the finding that “the notion of ‘*Sonderweg*’ is not necessarily restricted to the German case” (12), and, as a voice of a participant in these controversies, just as an example, KOCKA (1987a), especially the references in KOCKA (1987b) 62 f., no. 51; in a way, also, from a more specific legal historian’s view, GRIMM (1987) esp. 172–179, and 185 f. Very recently, there is again some debate (on the debate and its history) in Germany, see only WINKLER (2021).

dent in the field of ‘nation building’ and the case examples of ‘state shaping’ processes in the 19th and 20th centuries.

The degree to which the underlying manifestations of diversity differed with regard to the national reports, which in each case interacted with the mostly state resources of the law, will only be shown here very briefly and in examples: while, in the case of Spain, the problem of law and diversity from the perspective of the ‘national’ might have been fuelled, in particular, by a historically grown regionalism, which, in the course of nation-state formation, had to be transformed into constitutional law, in Belgium, it was the question of language heterogeneity and the lack of congruence between language and nation-state borders that was at the forefront of the debate as a historical experience of ‘Law and Diversity’.

Such country-specific characteristics and developments were also examined through the lens of intellectual history, observing the level of scholarly reflection in academia: in the course of the conference, for example, the *Genossenschaftstheorie* was discussed as an influential doctrine, especially for Germany, being an example of a special theoretical means, or attempt, of doing justice to the plurality of (collective) features, or maybe also interests, and of being able to represent them in the language of law. Such initially European, or even merely national, experiences or ideas obviously had an influence on Latin American discourses, but, over there, they seem to have receded behind the dominant experiences of ethnic and generally (post-)colonial diversity that were, in this form, alien to the European context of their origin. In the discussion of the Latin American cases, it, accordingly, became clear that, here, especially with regard to processes of ‘nation building’ and ‘post-colonial state shaping’, the debates and struggles primarily concerned questions of political representation and the definition of an indigenous identity and its possible legal consequences.

Overall, this ‘functional’ approach to diversity from the angle of legal history, using the example of ‘nation building’ and ‘state shaping’, already raised many basic questions or themes that have guided the discussions in other places: be it processes of ‘migration’, ‘transformation’ or ‘translation’ of ideas, and the problems of grasping them in a methodically adequate way;³ be it the problem of unity and (or *vs.*) ‘diversity’ in what can be called

3 Cf., e.g., for an account on the dimension of ‘time’ in the context of ‘legal transplant’: GALINDO (2014).

‘multi-level-systems’; or, not least, the never negligible question of the political dimension in the face of highly charged and conflictual concepts and underlying problems. These themes of the discussion will now be examined a bit closer.

2 Migration and transformation of concepts and ideas

Together with the obvious and general key question of the existence of possibly different national traditions in the respective experience of ‘Law and Diversity’, another of the overarching themes of the discussion thus appeared to be the question of how, and under which transformations, ideas on relations of diversity and law, or on mechanisms for implementing diversity in the language of law, made their way from Europe to Latin America.

In the European context, the example of the aforementioned *Genossenschaftstheorie* and the fate of its reception overseas were presented, and as a broader supranational example, theories of a special legal status or legal order of certain, in the broadest sense, ‘non-state’ actors such as the church(es) were also discussed.

However, in the Latin American context, it remains to be noted that it seems less accurate to speak of a mere ‘receiving’ of ideas, since the corresponding findings should rather be understood as processes of active and creative adaptation and transformation. Although it has been recognized with reference to various case studies that there was a dominant direction in the migration of ideas, these ideas underwent a transformation in the specific context of the respective place and time of reception. In Latin America, European-shaped thinking about law not only met with a corresponding legal culture formed by the *derecho indiano*, but the experience of ‘Law and Diversity’, especially in the context of the ongoing state building, could not be separated from an examination of the consequences of colonialism emanating from Europe, characterised above all by an emphasis on an *ethnic* dimension of diversity.

In this context, the question of the functioning of certain codification debates as well as the role of the respective country-specific legal-education systems – another important object of observation – were felt to be worthwhile for further inquiry, especially concerning phenomena of context-dependent adaptation of originally external concepts. Even though the latter were only partially and exemplarily considered here, the potential such an

approach to the underlying question could have become apparent. Especially examining the training of legal practitioners was seen as promising to better identify phenomena such as the influence of certain lines of tradition or the integration of disciplines such as sociology, anthropology or postcolonial studies and their (partly “migrated” and thereby transformed) traditions.

3 Freedom and equality, democracy and dictatorship, uniform law and special law

Among the recurring themes of the discussion was the relationship between the presented examples and topics and ‘freedom’ as one of the underlying key concepts of many forms of diversity thinking. It was brought to the fore, particularly when discussing the topic of ‘autonomy’, but also in the discussions on lines of thought concerning codification and (or *vs.*) special law. In these regards, it was argued that ‘freedom’ was the fundamental problem of 19th-century legal thought. This claim was at the same time a denial that concurring concepts, namely ‘equality’ or ‘justice’, could have been in this predominant position: to the extent that the idea of equality also became virulent in the 19th century, it was to be understood primarily as a corollary of the guiding principle of individual freedom. The ‘social law’ that emerged in various ways, for example, was understood less from the perspective of inclusion and exclusion than from the issue of intervention in spheres of freedom. Even where 19th-century law and legal scholarship were concerned with ‘the social issue’, the question of freedom had a formative effect as the determining background. Therefore, one of the important angles from which ‘social’ issues were treated lay in the finding that certain persons were not *really* free (due to social disadvantage). The possible lack of equality or the need to establish equality played, at most, a secondary, derived role.

In addition to the point of the primacy of ‘freedom’ over ‘equality’ in the 19th century, there were also warnings against conceiving the idea of equality, even in this rather subordinate importance, as a specific product of the 19th century. Thus, for instance, it was mentioned that canon law has always been centrally concerned with equality, as could be seen, for example, in marriage law of the 12th or 13th centuries. Considerations or regulations that, using modern terms, could be labelled as ‘social security’ or ‘consumer

protection' were also recognisable much earlier, as could be clearly learned from the works of Karl Härter and Michael Stolleis.⁴

Regarding the 19th-century thinking on special law, for the eminent protagonists of the historical school, their idea of *ius singulare* was highlighted, which, for them, was never seen as unconnected from *ius commune*. In such a system, it was not possible to integrate phenomena such as Bismarck's legislation on social security.

Just like these remarks on 'freedom' and 'equality', 'democracy' and 'dictatorship' were touched upon as keywords that were also addressed in various panels. Using examples from different, especially Romanic, countries, the participants also addressed the connection between special, in particular social, legislation, 'corporatism' and dictatorship. This referred to political programmes of – mainly – the interwar period⁵ which, contrary to liberal-individualistic principles, combined a pronounced emphasis on diversity with an often clearly authoritarian bent by fundamentally drawing on the inequality of humans, or their social formations and groups (mostly centred on the feature of 'vocation' or 'profession').

This inequality was meant to be reflected in a correspondingly differentiated political, constitutional or legal order that integrally included characteristic subdivisions into special units or suborders. At the same time, however, these different groups, orders, communities or organizational entities with the (special) law applicable to them – or, even, also (co-)created by them – were mostly thought of as elements of one higher whole, usually a dictatorial, authoritarian or, at least, hierarchical state. Supporters of a mindset of special law, such as corporatists, thus, often showed a high affinity for dictatorship. However, a differentiated picture was called for here, as well, since, as the example of Spanish legal biographies was said to show, connections could also be drawn precisely from the idea of *uniform* law or *codification* to those of corporatism and dictatorship.

4 For the extensive research in this area, see especially the multi-volume series "Repertorium der Polizeyordnungen der Frühen Neuzeit" edited by Härter and Stolleis; cf. further, e. g., HÄRTER (2010) as an English language contribution.

5 See for important, also comparative aspects as a recent overview of several European countries: COSTA PINTO (ed.) (2017). For corporatist "transnational diffusion" between Europe and Latin America now: COSTA PINTO/FINCHELSTEIN (eds.) (2020).

4 From freedom to autonomy?

As mentioned, close ties to the concept of ‘freedom’ could be made for most of the topics presented. This was of special importance, however, for the panel on ‘autonomy’. ‘Autonomy’ is a word that acquired remarkable power wherever it was used. It was – and still is – often associated with high expectations, but in very different contexts. This multitude of the term’s contexts of use is especially emphasised whenever more fundamental studies from a legal perspective, in the broadest sense, are concerned. The legal *historian’s* perspective of this conference, however, showed, not least in the discussions, some more special characteristics that normally do not gain that much attention in such overviews and descriptions of autonomy’s various meanings in the legal context.⁶

But, even under the specific perspective of the conference, it nevertheless became apparent, once more, in how many different contexts and with how many different meanings ‘autonomy’ functioned as a key concept. Maybe, they can be sorted into two broader categories: on the one hand, ‘autonomy’ could appear with a strongly subjectivist or individualistic connotation, whereas, on the other, it could also be used in contexts that were more oriented towards collectives or organisation(s).

With respect to the first dimension, references to Kantian traditions and, especially, the concept of ‘private autonomy’ played the dominant role, of course. Thus, here, the area of private law was mainly concerned. But criminal law was also mentioned (especially regarding the notion of ‘free will’). These examples already show that, also for the variety of mentioned examples on ‘autonomy’, the overarching question on the role of the concept of ‘freedom’ was relevant. Wherever autonomy thus included ideas of certain “spaces of freedom”, its enormous importance, especially for post-colonial contexts, was noted, *inter alia*. It was suggested to inquire in this direction for further specialties. For sure, colonial experiences had significant effects on discourses on ‘autonomy’.

Beside this rather subject-oriented line of use of the term ‘autonomy’, there was, as mentioned, a second dimension in the discussions. There, ‘autonomy’ came into play in a more organisation- or collectivity-oriented

6 Cf. as one recent example under the initial question “Autonomy – which Autonomy?”: JESTAEDT (2020).

sense. In this perspective, the concept of autonomy raised the question of the relationship between diversity and phenomena that could be labelled as legal ‘multi-level systems’, for example. Moreover, the concept of ‘multi-level systems’ itself could serve as a possible grid of analysis for examinations of certain aspects of ‘law and diversity’ as well.⁷

A concrete question was asked about the comparability of the observations on municipal autonomy with federal structures. The keywords ‘diversity and federalism’ also provided a historical example of how this organisational dimension of autonomy can be linked with the subjectivist-individualistic side of autonomy that was addressed before: here, reference was made to the period of different regional penal codes in Italy. Finally, several hints on the relationship between autonomy and concepts of sovereignty could be related to the keyword ‘federalism’ as well.

More fundamentally, with regard to this second dimension of autonomy, it was asked whether certain patterns can be discerned of what exactly is organised by or in the form of ‘autonomy’, and whether this is a generally relatively clear and broadly shared concept or, rather, a phenomenon that may vary greatly from sector to sector, and of course from legal culture to legal culture.

Related to this, the discussion of the question proceeded as to whether differences between different legal cultures can be seen in the functioning of what can be called ‘self-regulation’ in a broad sense. As already mentioned, some of the intellectual backgrounds behind concepts of autonomy, such as *Genossenschaftslehre*, turned out to be very specifically rooted in the traditions of certain countries or legal traditions. This finding led not only to the question of similarities and differences, but also of possible transfers or migrations of ideas across (legal) spaces (see above, under “2”), whereby the question of possible connections between Germany, France, and South America was raised.

In all of this, the difficulty of distinguishing between autonomy as a political and a legal concept and, also, of distinguishing between its descriptive and its normative use, which were registered at different points in the discussion, always seemed to be part of the problem. It also became clear that, above all, caution is required because autonomy serves both as a

7 For recent observations on the attractiveness but, also, the inflationary use of ‘multi-level systems’ terminology, see CHANOS (2019).

research concept and may appear, at the same time, as a term from the sources themselves, while the meaning of both is not necessarily congruent.

5 (Legal) pluralism

Just like autonomy, another term which lacks a clearly determined meaning and a limited context of use is ‘pluralism’. However, some main lines of the discussion could be observed. As the conference dealt with traditions of ‘pluralist’ *legal* thinking from the angle of ‘diversity’, it seemed that, all in all, the discussion somewhat moved towards a curbing of any possible ‘pluralism’ euphoria. The tendency was to add water to the, at least for some, exceedingly pluralistic wine.

This concerned the role of the state or of superordinate central legal orders. The importance of both was emphasised several times. Partly, it was even doubted that something like ‘legal pluralism’ could be imagined without any such framework or pivotal point at all. It was claimed that one must not neglect the fact that, empirically, such aspects of unity or of monist orientation were quite strong in the ‘*Altes Reich*’ despite all the ancient regime’s ‘legal pluralism’. Here, one could not speak of an unregulated side-by-side, or even jumble, of different legal systems and instances. The purpose of *ius commune*, which was given as an example, was to avoid conflicts and regulate clashes. There had also been rules governing the relationship between the *Reichshofrat* and *Reichskammergericht*. Participants also emphasised the fact that pre-modern ‘legal pluralism’ had always, at least, found itself in conflict with an equally extremely pronounced pre-modern ‘anti-pluralism’. In the seemingly pluralistic conditions of this past, often, a *divide et impera* tended to be expressed.

And, even where one deems it appropriate to speak of ‘legal pluralism’ for historical constellations, this would be, according to some comments, useless for discussions nowadays or, even more so, as a legitimisation of today’s legal pluralist intentions, since the historical phenomena that might be described as ‘legal pluralism’ have nothing in common with those of the present. This was particularly evident in the example of historical *lex mercatoria* on the one hand, and what is discussed today under the same name – but being of a very different nature – on the other. In any case, legal pluralism was probably only ever taking place within some kind of overarching and shared ‘constitution’, or order, in the broadest sense. Thus, this part of the discussions, too,

ultimately touched categories such as ‘competence’, ‘sovereignty’ or ‘multi-level systems’.

In this context, there was an intense discussion about Hans Kelsen, who is probably the most prominent modern thinker of a (positivist) legal order (which, at least for him, necessarily also meant: state order) and its ‘unity’, founded in one central point. The debated issue of whether or not, and to what extent, Kelsen, who at first sight appeared to be a ‘monist’ *par excellence*, could also be described as a ‘pluralist’, proved to be unproductive, or at least imprecise, insofar as this could be assessed in very different respects. With regard to the *Stufenbau* of the legal system, where, according to Kelsen, extensive ‘discretionary power’ exists at each level (which could also be interpreted as a kind of ‘pluralism’), one would arrive at a very different conclusion, as compared to the classic example of church law, which Kelsen also discussed and integrated into his monist system of (state) law.⁸ The latter case showed a characteristically non-pluralist image of Kelsen, which was also the case for the remarks on his dispute with the *Anerkennungstheorie* formulated by Bierling.⁹

The warning not to underestimate features of legal unity and, above all, the power of the state in possible pluralistic exuberance was finally applied in a similar way to the example of contract law. However, this warning was also called into question by others, for, here, a controversy arose as to whether the decisive factor in a contract was ultimately the concern for, and the interest in, its guaranteed enforcement: if one places the emphasis on this aspect (which was also criticised by some as a very ‘public-law’ view), the indispensable central role of the state is unmistakable, even in the case of all non-state or ‘private’ lawmaking (as could be demonstrated by the example of the conclusion of a contract). According to this view, what ultimately matters to the parties of a contract is to obtain an enforceable judgement in case of conflict – even an arbitral award depends on the state’s enforcement. The key phrase “in the shadow of the Leviathan” was repeatedly invoked here.¹⁰

8 Kelsen (2019 [1925]) 322–330 [133–136], esp. 325 [134].

9 Just as examples for accounts on the divide (or even similarities) between Kelsen and Bierling: Yoon (2009) 50–79; or Seinecke (2015) 118–120 (and on Bierling in general, 74–84).

10 Classically: Spittler (1980). For a re-examination of this “path-breaking article” see now Beyer/Girke (2021).

In general, warnings were made against an overly broad understanding of ‘legal pluralism’ (and, thus, also ‘law’), completely losing contours, and against a “romanticisation” of legal pluralist constellations. In particular, such constellations were by no means necessarily related to ‘republican’, or even ‘democratic’, ideas. These ideas, on the other hand, could conversely go together with pronounced legal concepts of unity or uniformity quite well. Finally, participants mentioned the fact that ‘legal pluralism’ is also an ideology and that this should never be ignored when talking about it. In the case of ‘pluralism’, as in the case of ‘autonomy’, it was, therefore, particularly noticeable that a distinction had to be made between its character as a legal concept and as a political one.

6 Politics and ideology, multi-level systems and discrimination

Here again, another recurring theme of the discussions emerged: the relationship between ‘Law and Diversity’ and the dimensions of politics and ideology. It became visible through the examples of ‘autonomy’ and ‘pluralism’, especially in the connections to a category such as ‘multi-level systems’ that could be made in several respects, but also through another, more concrete, example: anti-discrimination law.

First, it was argued that equality and equal treatment, or problems of (non-)discrimination, should be more closely linked to the category of ‘status’. This should also take into account the connections existing between *economic* positions and legal positions, such as so-called passive *vs.* active citizenship, voting and other participation rights, as well as their restrictions or gradations, etc. In (post-)colonial contexts and in countries with indigenous population groups, there is often a great deal of diversity, i. e. inequality of treatment, and, if you like, ‘discrimination’ in terms of legal consequences depending on the status attributed. But this was particularly and equally true of German legal history in the 19th century, for example. The federal or fragmented state structures in Germany, at that time, or, so to speak, the ‘multi-level system(s)’, which also included municipalities and other bodies, had even expanded this constellation. Thus, what could be shown were “different combinations of disadvantages or social differences with different legal statuses on different legal levels” (Collin).

An issue that was also raised was the difficulty to recognize some specific disadvantageous status legally (even when focusing more on the fight against

disadvantages instead of discrimination *per se*): for the legislator, it might be easier, for example, to refer to ‘race and gender’ than to ‘socioeconomic status’, as the latter’s “recognisability” is legally difficult to grasp. As an example, it was reported that, in England, a person’s ‘accent’ is used in social reality as an important distinguishing feature, but formal legal conclusions could hardly be linked to it.

In a certain way, ‘multi-level systems’, as a category for analysis, returned several times in the discussion of ‘discrimination and anti-discrimination’. One of the examples one could interpret as its application concerned the case of Chile with regard to the legal interplay (or coexistence, or also conflict) between the national and the international level. What was referred to, here, was the influence of human-rights directives of international or supranational origin and, accordingly, the judicature by international human-rights courts and its impact on national courts and the legal development at national level in general. It was shown precisely, here, how grave shifts and breaks due to changing political conditions in a country could be, while the legal framework may be remaining partly the same.

It was also the example of Chile, under the Pinochet dictatorship, that led the discussion to the question of discriminatory effects, whether intentional or unintentional, which can be caused through the means of an alleged anti-discrimination law, or through postulates of equality that were established in a specific historical-ideological context. This issue could be described as the “use of anti-discrimination law in favour of discriminatory practice”. In addition, with reference to some examples, it was noted that there is the possibility of presenting something precisely as recognition and appreciation of differences, and thus as an adequate legal expression of diversity, when it is perceived by others as exactly the opposite, i. e. as discrimination that needs to be overcome, and thus as unjust.

This, then, led to the discussion about problems regarding the concept of discrimination itself, and possible alternatives. The example prominently discussed by Catharine MacKinnon was mentioned, in which a woman complained that she had been sexually harassed by her superior and, thus, discriminated against, whereupon the superior replied that it could hardly be discrimination as he behaved in the same way towards men, too, and thus practised equal treatment.¹¹ A new reflection on the definition of ‘discrim-

11 MACKINNON (1987) 107 f.

ination' was, therefore, deemed necessary. This also applies to the question of whether the focus, somehow, shifts away from the protection of certain social groups and, simply, onto the prevention of undesirable behaviour. Finally, it was asked whether reflections and problematisations of concepts like these can be observed in the different legal systems.

Following on from this, the question was raised as to when, and in what context, the term 'discrimination' first appeared in legal discourse in the different countries. It was also considered necessary to investigate and compare the further conceptual history of the term in the respective countries. In the case of English law, as an example, it was briefly outlined that, in 1918, there was the concept of 'sex disqualification', whereas, in the 1960s, the dominant theme was 'race relations' and, then, in the 1970s, 'sex discrimination' was introduced as a legal term. Such shifts and changes show how extremely historically contingent, how differently, at different times, different groups were seen as (not) experiencing discrimination at all. In politics as well as in law and legal discourse, 'autonomy', 'pluralism' and 'discrimination' are repeatedly used consciously and purposefully by specific actors in specific contexts to achieve specific goals, or to implement certain 'ideologies'.

Thus, the presentations and discussions on discrimination and anti-discrimination law – but, by far, not only them – were those that especially showed how much an adequate legal-historical investigation of 'Law and Diversity' must, at the same time, include an account of political and ideological history when dealing with such highly charged, and flexibly *chargeable*, concepts as 'discrimination' or 'equal treatment', which occupy key positions in both the legal and political discourse (as it was similarly discussed with the example of 'autonomy' – and this is by no means important only for these particular terms).

7 Problems of method

These strands of the discussion made clear how central an analysis of term usages is for the issues raised. It would, therefore, be necessary to clarify the question of the extent to which a legal-historical account of 'Law and Diversity' is to be understood primarily as conceptual history, and which dimensions (possibly not only the political) it must include. In general, the topic of 'discrimination' was the starting point for methodological discussions and

also for differences of opinion, especially with regard to a ‘conceptual history’ approach.

It was also noted, among other things, that, as far as the word ‘discrimination’ is concerned, it can only convey a very partial view, since the potential discriminators themselves are unlikely to ever actively use this term for their actions and identify with it. Another suggested category of analysis, not only in connection with the topic of ‘discrimination’, was ‘normalisation’, which has recently been strongly addressed by researchers in various disciplines.¹²

Among the other methodological problems discussed, especially in connection with the ‘conceptual history’ approach, one can probably also count the broad and multifaceted issue of ‘language and translation’, which appears, not least, in the context of ‘discrimination’. Apart from the many different ways in which the term ‘discrimination’ is used, it seemed questionable, for example, whether central terms such as ‘discrimination’ are used in this context, in German law, in the same or a similar way in other languages and legal systems. At the same time, reference was made to a substantial discourse, which emphasises the fact that discrimination does not lie in every disadvantage or preference, but that, when making distinctions for their discriminatory or, on the contrary, anti-discriminatory character, it always depends on the respective contexts of social power structures in which the distinctions are made (e.g., the promotion of women).

The issue of language, translation and translatability was, thus, far from being relevant only for the panel that was explicitly dedicated to it, but pervaded the overall discussion and emerged at different, connectable levels, both as a methodological problem and as an object of investigation. As regards especially the latter, among the most striking issues were problems of (il)literacy of the historically involved persons and of the diverging perspectives of the speaker(s) in sources (for example, from missionary contexts).

On the topic of ‘language’, a connection was even and also seen with the possible analytical category of ‘self-regulation’, which, apart from that, came into play primarily through the topic of ‘autonomy’, but also at the very beginning, when sociological approaches were more widely discussed (while

12 As an example for relatively recent contributions, see only the works of Jürgen Link on “normalism”, e.g. LINK (2006 or 2018).

there was, surprisingly, less talk of ‘self-regulation’ than of ‘constitutional embedding of differences’). Specifically, this came up with the example of the influential role of the *academias* in establishing an authoritative, standardised form of the Spanish language in Latin America. Particular reference was also made to the interrelation between the legal profession and the writing of authoritative dictionaries in the 17th and 18th centuries, and to the maybe surprising observation that, in colonial times, ‘native languages’ may have received greater academic or official attention than in post-colonial times, because priests were required to speak at least one locally rooted language and they also compiled collections, dictionaries, etc. A collection of “cultural curiosities” by Catherine II, empress of Russia, was also mentioned as another example in this context.

As mentioned before, in terms of method, it was emphasised at several points that, when examining the ‘migrations’ or ‘translations’, and thereby, also, the ‘adaptions’ and ‘transformations’ of certain ideas among disciplines (e. g., from social science to legal science), but even more so geographically (foremost: between Europe and Latin America), an *institutional* aspect needs to be taken into consideration and must not be underestimated. This institutional aspect could be combined very well with *biographical* studies. Such an approach would need to shed light on ‘mechanisms’ through which, before different forums and in different contexts, such as ‘law schools’, the media, court practice, political language, etc., certain ideas or terms were ‘received’, ‘translated’ or (re)defined in a specific manner. Such, in the broadest sense, institutional determinations and dynamics were deemed to be of high importance when aiming at an adequate understanding of concepts or practices that were – seemingly – common and shared transnationally. *Vice versa*, the same holds for an analysis of the absence, or failure, of certain concepts, or practices, in particular countries. Not least, such developments could often be illuminated quite well with the example of historically influential individual actors. Different ones were mentioned, especially Latin American scholars. This entire field was grasped under the label “translation as a *social mechanism*”.

Not least, it was repeatedly discussed which kind of sources would be suitable to answer the questions raised. At various points, warnings were issued against narrowing the focus to ‘law in books’.

8 Category schemes and terminology for further investigations

Closely linked to these mainly methodological questions, the possibly most fundamental task was, of course, to develop premises, theories and hypotheses that would guide and pre-structure research. This was not so much about the sources, their own terminology and the methodically correct handling of them, but, rather, about the design of an appropriate formation of categories (*Kategorienbildung*) and research terminology, which should, not least, be informed by social science.

First, there were discussions on particular topics for, so to speak, ‘smaller’ categorial schemes better tailored to the respective fields. From these, one example might be picked out, here: the scheme of ‘subordination’, ‘disciplination’ and ‘integration’, which was suggested for the case study of Brazil on the topic of ‘diversity and legal personality’, was discussed regarding its possible applicability to other examples. One of them was Russia, where a very different picture might be shown as, with regard to ethnical diversity, a policy of ‘full integration’ was pursued over there. In addition, regarding the English example, the question was discussed as to what extent a separation between addressing ethnical and religious diversity is possible. Finally, and this again touched on the possible category of ‘multi-level systems’, it was asked whether, in terms of ‘status’ and personhood, differences could be identified between (more or less effectively) centrally governed structures and their legal orders, on the one hand, and more federalist ones, on the other.

But, besides these more detailed and narrow questions, what was largely discussed were the problems and possibilities of a general conceptual scheme at an abstract and overarching level. In an attempt to take up, for this purpose, the four-field scheme initially outlined in the conference by Alfons Bora,¹³ the discussion concentrated especially on the issue of ‘alterity’. In parts, it was doubted whether this aspect could, for example, be applied to the German context. On the contrary, as some suggested, in the case of Germany, a serious lack of ‘alterity’ thinking might be seen as typical and as what is, precisely, making the German tradition that problematic. Even though there was a certain degree of agreement with this judgment, it was also suggested that one should interpret the concepts of certain German

13 See the contribution by Bora in this volume.

legal theorists such as Klaus Günther (“the sense of appropriateness”)¹⁴ or Gunther Teubner¹⁵ as an expression of alterity thinking. And, especially for the latter, it was emphasized how normative his conceptions would be.¹⁶

This was also why it was repeatedly noted that the scheme created by Bora was not meant to be a historical description, or a tool, to localise certain persons or certain, even if they are typified, theoretical positions within it. Rather, it should serve heuristic purposes in an ideal-typical way. That explains the possibility of placing the work of one single author in different sectors of this scheme. Discussing the scheme, it was also asked whether it is correct to put ‘multinormativity’ (and thus, probably, ‘legal pluralism’ in a certain sense as well) in its empirical sector. Here, it was argued that the emphasis on such terms would often come along with a “normative claim” as well, and that discussions centred around such terms would often, also, aim at shifting the focus more towards alternative or deviating normativities, and open the field to the possibility of also regarding (or establishing) them as ‘law’.

This objection, thus, also concerned the fundamental question of the ‘identity of law’ that was, of course, posed at various points in view of differentiation and diversity throughout both conferences.

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14 GÜNTHER (1993).

15 Cf. only TEUBNER (2009); TEUBNER/KORTH (2009).

16 For a discussion of relevant aspects, see GÜNTHER (2016).

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Contributors

Ezequiel Adamovsky, Professor/Principal Researcher, University of San Martín/CONICET, Buenos Aires, Argentina

Alfons Aragoneses, Professor, Departament de Dret, Universitat Pompeu Fabra, Barcelona, Spain

Samuel Barbosa, Professor, Law School of the University of São Paulo, Brazil

Victoria Barnes, Reader of Commercial Law, Queen's University Belfast, Northern Ireland, United Kingdom

Manuel Bastias Saavedra, Associate Professor, Historisches Seminar, Leibniz Universität Hannover, Germany

Agnieszka Bień-Kacała, Associate Professor, Faculty of Law and Administration, University of Szczecin, Poland

Alfons Bora, Professor, Fakultät für Soziologie, Universität Bielefeld, Germany

Agustín Casagrande, Professor for Sociology of Law, Universidad Nacional de La Plata; Professor for Legal History, Universidad Nacional de San Martín, Buenos Aires, Argentina

Peter Collin, Senior Researcher and Research Field Coordinator, Max Planck Institute for Legal History and Legal Theory, Frankfurt am Main, Germany

Bruno Debaenst, Associate Professor and Senior Lecturer in Legal History, Uppsala University, Sweden

Carsten Fischer, Professor, Fachbereich V: Rechtswissenschaft, Universität Trier, Germany

Armando Guevara Gil, Rector, Universidad para el Desarrollo Andino, Lircay, Perú

Hans-Peter Haferkamp, Professor, Rechtswissenschaftliche Fakultät, Universität Köln, Germany

Jean-Louis Halpérin, Professor, École Normale Supérieure – PSL, Paris, France

Barbara Havelková, Associate Professor and Tutor in Law, Faculty of Law and St Hilda's College, University of Oxford, United Kingdom

Stefan B. Kirmse, Senior Research Fellow and Research Coordinator, Leibniz-Zentrum Moderner Orient, Berlin, Germany

Stephan Kirste, University Professor for Legal and Social Philosophy, Head of the Department for Legal Theory, European and International Law at the Paris Lodron University of Salzburg, Austria

Gloria Patricia Lopera-Mesa, Associate Professor and member of the research group “Derecho y Globalización”, Universidad de Bogotá Jorge Tadeo Lozano, Bogotá, Colombia

Massimo Meccarelli, Professor, Dipartimento di Giurisprudenza, Università di Macerata, Italy

Rodrigo Míguez Núñez, Associate Professor of Private Law, Università del Piemonte Orientale, Vercelli, Italy

Fernando Muñoz, Researcher, History Department, Faculty of Law and Social Sciences, Universidad San Sebastián, Concepción, Chile

Zülâl Muslu, Assistant Professor, Tilburg Law School, Tilburg, Netherlands

Michele Pifferi, Professor, University of Ferrara – Law Department, Ferrara, Italy

Thiago Reis, Professor, FGV São Paulo Law School, São Paulo, Brazil

Pedro Henrique Ribeiro, Director of Graduate Studies, Faculty of Law and Social Sciences, Universidad de Monterrey UDEM, San Pedro Garza García, Nuevo León, Mexico

Ralf Seinecke, Researcher, Max Planck Institute for Legal History and Legal Theory, Frankfurt am Main, Germany

Thomas Simon, Professor, Rechtswissenschaftliche Fakultät, Universität Wien, Austria

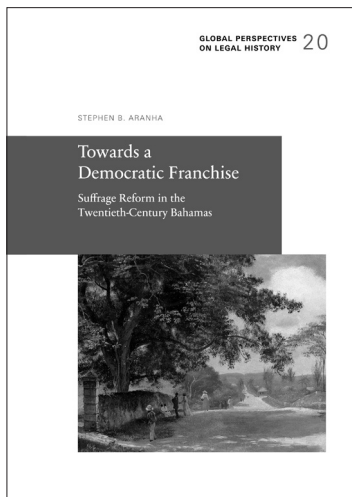
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Orlando Villas Bôas Filho, Professor and Researcher, University of São Paulo and Mackenzie University, São Paulo, Brazil

Leonard Wolckenhaar, Trainee Lawyer, Oberlandesgericht Hamburg, Germany

Nancy Yáñez Fuenzalida, President of the Constitutional Tribunal of Chile, Santiago, Chile

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Stephen B. Aranha

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